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No. 89-1106

In The

Supreme Court of the United States

October Term, 1989

TRINOVA CORPORATION,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Michigan

BRIEF OF ALCAN ALUMINUM CORPORATION, ET AL. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BEST AVAILABLE COPY

LIST OF AMICI CURIAE

ALCAN ALUMINUM CORPORATION,
ALLEGHENY LUDLUM CORPORATION,
ALUMINUM COMPANY OF AMERICA,
ARMOUR AND COMPANY,
ARVIN INDUSTRIES, INC.,
ASHLAND OIL, INC.,
BP OIL INC.,
BEATRICE COMPANY,
BECTON DICKINSON AND COMPANY,
THE BOC GROUP, INC.,
BLUE BELL, INC.,
BROCKWAY, INC.,
BURLINGTON INDUSTRIES, INC.,
CARLISLE CORPORATION,
CASTLE & COOKE, INC.,
CENTRAL SOYA COMPANY, INC.,
C. H. MASLAND & SONS,
THE COCA-COLA COMPANY,
COLGATE-PALMOLIVE COMPANY,
COLT INDUSTRIES OPERATING COMPANY,
CONSOLIDATION COAL COMPANY,
CONTROL DATA CORPORATION,
CRUCIBLE MATERIALS CORPORATION,
CUMMINS ENGINE COMPANY,
DATA GENERAL CORPORATION,
DEARBORN CHEMICAL COMPANY,
DIAL CORPORATION,
DIGITAL EQUIPMENT CORPORATION,
DONALDSON COMPANY, INC.,
THE DURIRON COMPANY, INC.,
E. I. DU PONT DE NEMOURS & CO.,
ELI LILLY AND COMPANY,
E. R. SQUIBB & SONS, INC.,
THE FIRESTONE TIRE & RUBBER COMPANY,
FIRST WISCONSIN FINANCIAL CORPORATION,
FISCHBACH AND MOORE, INC.,
FLEETGUARD, INC.,
FMC CORPORATION,

LIST OF AMICI CURIAE (Continued)

FOAMEX PRODUCTS, INC.,
GENERAL FELT INDUSTRIES, INC.,
GEO. A. HORMEL & CO.,
GRACE PETROLEUM CORPORATION,
HAMMERMILL PAPER COMPANY,
HONEYWELL INC.,
HONEYWELL INFORMATION SYSTEMS, INC.,
HOUSEHOLD MANUFACTURING, INC.,
HOUSEHOLD MERCHANDISE, INC.,
ICI AMERICAS, INC.,
INTERNATIONAL BUSINESS MACHINES CORPORATION,
INTERNATIONAL PAPER COMPANY,
JOY MANUFACTURING COMPANY,
KITCHENS OF SARA LEE, INC.,
LYNCHBURG FOUNDRY COMPANY,
MAGIC CHEF, INC.,
McDONALD'S CORPORATION,
MIDWAY AIRLINES, INC.,
MINNESOTA MINING AND MANUFACTURING COMPANY,
MOBAY CORPORATION,
MOORE BUSINESS FORMS, INC.,
NORANDEX INC.,
NORTHERN TELECOM INC.,
OLIN CORPORATION,
PRESTO PRODUCTS, INCORPORATED,
PRIMERICA CORPORATION,
RCA CORPORATION,
R. J. REYNOLDS TOBACCO COMPANY,
SARA LEE CORPORATION,
SCOTFOAM CORPORATION,
SHELLER-GLOBE CORPORATION,
SQUARE D COMPANY,
STANDARD PRODUCTS COMPANY,
STANDARD OIL CHEMICAL COMPANY,
SUN REFINING AND MARKETING COMPANY,
SUPPORT TERMINAL SERVICES, INC.,

LIST OF AMICI CURIAE (Continued)

TELEFLEX INCORPORATED,
THIOKOL CORPORATION,
TOYS "R" US,
UNION CARBIDE CORPORATION,
USS GREAT LAKES FLEET, INC.,
USX CORPORATION,
W. HEATH & COMPANY,
W. R. GRACE & CO.,
WM. WRIGLEY JR. COMPANY

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STATEMENT OF INTEREST

The procedural history of this case is a source of grave concern to Amici as multistate taxpayers transacting interstate business involving contact with the State of Michigan. The sequence of events which have transpired, beginning with the enactment of the Single Business Tax ("SBT") Act, the unanimous and final interpretation of § 69 of that Act by the courts of Michigan, the subsequent legislative amendment of § 69 alleged to have retroactive effect and the decision of the Michigan Supreme Court in this case call into question the fairness of the apportionment process under the SBT, the equality of treatment of multistate taxpayers domiciled within and without the State of Michigan and the tax consequences arising from interstate transactions concluding in Michigan.

Each Amici multistate taxpayer has an interest in the outcome of this case as either a Plaintiff in the Michigan Court of Claims seeking refunds of single business tax under § 69 of the Act or as a Petitioner in the Michigan Tax Tribunal seeking refunds of the tax or opposing assessment of additional single business tax where a request by certain Amici under § 69 of the Act has been denied by Respondent or as SBT refund claimants whose claims have not yet been ruled upon by the Respondent. Thus, Amici are situated similarly to the Petitioner in that in various administrative and judicial forums they seek the same type of relief under § 69 of the Act as was sought by Petitioner below.

The Michigan SBT Act was enacted as 1975 PA 228, MCL 208.1 *et seq.*; MSA 7.558(1) *et seq.* effective January 1, 1976 ("the Act"). The provision of the Act at issue in this case, § 69, was enacted in 1975 and remained unaltered until June 9, 1987 when 1987 PA 39 ("PA 39") was signed into law. Section 69 is Appendix Exhibit 1. 1987 PA 39 is Appendix Exhibit 11.

Section 69 of the Act was applied by the Michigan Tax Tribunal in *Jones & Laughlin Steel Corp v Michigan Dep't of Treasury* and *Wilson Foods Corp v Michigan Dep't of Treasury*, Docket Numbers 57892 and 57893 (September 5, 1984) ("*J & L*"). Appendix Exhibit 2. In *J & L*, the Tribunal decided that the factual test contained in § 69 of the Act, whether the apportionment provisions of the Act unfairly represented the extent of *J & L's* business activity in the state, had been met. The Tribunal determined the test was met based upon a showing that 50% more compensation paid by *J & L* in its business conducted everywhere was attributed to Michigan through the operation of the apportionment formula than J & L demonstrated was actually paid in Michigan. In a seven page opinion, the Michigan Court of Appeals affirmed the Tax Tribunal on September 3, 1985. 145 Mich App 405; 337 NW2d 397 (1985). Defendant applied for leave to appeal that decision to the Michigan Supreme Court and on March 18, 1986 the Court issued its Order denying the application for leave to appeal. 424 Mich 895; 384 NW 2d 8 (1986). Appendix Exhibit 3. On October 22, 1986, the Michigan Supreme Court denied reconsideration. 424 Mich 895; 384 NW 2d 8 (1986). Appendix Exhibit 4. Amici therefore understood the settled state of the law on this question to be that enunciated in the *J & L* decision of the Michigan Court of Appeals. Amici relied on this settled state of the law in filing their single business tax returns and/or refund claims arising from requests for apportionment formula relief under § 69.

In the meantime, the lower courts were consistently applying § 69 in granting apportionment formula relief to taxpayers who could demonstrate an unfair representation of their business activity. On June 11, 1986 Ingham County Circuit Chief Judge Michael G. Harrison granted judgment in favor of *Armco, Inc* in Docket No. 84-9612.

Appendix Exhibit 5. On January 24, 1987, Court of Claims Judge Stell granted judgment in favor of *Friendly Ice Cream Corp* in Docket No 86-10413-CM. Appendix Exhibit 6. On March 30, 1987, Court of Claims Judge (now Federal District Judge) Robert Holmes Bell authored a seven page *Opinion and Order of the Court* granting judgment to *MTD Products, Inc* in File No. 86-10416-CL applying § 69. Appendix Exhibit 7. On April 27, 1987 Chief Judge Michael G. Harrison granted judgment to *AMP Inc* in Docket No. 86-10216-CM. Appendix Exhibit 8. On May 5, 1987 Court of Claims Judge Robert Holmes Bell granted the judgment below for refund of SBT to *Trinova Corp* in Docket No. 86-10430-CM. Appendix Exhibit 9. On May 22, 1987 Court of Claims Judge Robert Holmes Bell granted judgment to *Penton/Industrial Publishing Co Inc* in Docket No. 86-10231-CM. Appendix Exhibit 10.

Then, PA 39 was signed into law on June 9, 1987. PA 39 amended § 69 of the Act. Appendix Exhibit 11. Respondent then sought to apply PA 39 retroactively to § 69 cases pending in the Court of Claims and involving tax years prior to 1987, alleging that PA 39 constituted a complete defense to the pending cases. However, on August 21, 1987 Court of Claims Judge Thomas L. Brown granted judgment in favor of *Consolidation Coal Co* for refund of SBT in Docket No. 82-8407. In *Consolidation Coal*, Judge Brown specifically considered PA 39 and found that it was not applicable to Plaintiff's preexisting SBT Refund Claim based upon *J & L*. Appendix Exhibit 12. On November 2, 1987 Court of Claims Judge Kallman denied Defendant's Motion for Summary Disposition of the SBT Refund Claim in *Digital Equipment Corp* in Docket No. 86-10484-CM. Judge Kallman rejected Respondent's claim that PA 39 was applicable to *Digital's* pre-existing SBT Refund Claim under § 69 of the Act. Appendix

Exhibit 13. On November 25, 1987 Court of Claims Judge Carolyn Stell granted judgment for refund of SBT to *First Wisconsin Financial Corp* in Docket No. 87-11132-CM. Judge Stell found Respondent's administrative effort to retroactively apply PA 39 to pre-existing SBT Refund Claims was not timely plead as an affirmative defense, but held in the alternative that retroactive application of PA 39 to pre-existing SBT Refund Claims for prior tax years would violate the U.S. Constitution's guarantee of due process and the commerce clause. In the alternative, Judge Stell also held that, factually, *First Wisconsin* had established that the apportionment provisions of the Act produced a grossly distorted result under PA 39 and granted judgment to *First Wisconsin* under § 69 as amended by PA 39. Appendix Exhibit 14.

On December 15, 1987 Court of Claims Judge James R. Giddings granted a judgment of refund of SBT to *Magic Chef, Inc* in Docket No. 86-10395-CM. Judge Giddings held that PA 39 was not retroactively applicable to Plaintiff's pre-existing SBT refund claims for the reason that PA 39 worked a substantive change to § 69 of the Act and that retroactive application would violate the Separation of Powers Clause of the Michigan Constitution. Appendix Exhibit 15. On December 17, 1987 Court of Claims Judge Stell granted judgment to *Sara Lee Corp* for refund of SBT in Docket No. 87-11143-CM for the same reason and on the same basis as in *First Wisconsin Financial Corp, supra*. Appendix Exhibit 16. On December 22, 1987 Court of Claims Judge James T. Kallman granted judgment in *Presto Products, Inc*, Court of Claims Docket No. 83-8827. (Appendix Exhibit 17) and also on December 23, 1987 to *Wm Wrigley Jr Co* in Docket No. 87-11013-CM. Appendix Exhibit 18. On December 23, 1987 Chief Judge Michael G. Harrison granted judgment for refund of SBT to *Blue Bell,*

Inc in Docket No. 86-10620-CM. Judge Harrison held that it was unnecessary to rule on retroactivity of PA 39 for the reason that Plaintiff sustained its burden of showing that the apportionment provisions of the Act when applied to Plaintiff's tax base for the years involved attribute activity to Plaintiff in Michigan which is out of all appropriate proportion to the actual business transacted in Michigan and led to a grossly distorted result. Appendix Exhibit 19. On January 4, 1988 Court of Claims Judge Stell granted judgment for refund of SBT under § 69 to *Sheller-Globe Corp* in Docket No. 87-11073-CM. Appendix Exhibit 20. On January 21, 1988 Court of Claims Judge Thomas L. Brown granted a SBT refund to *USX Corp* in Docket No. 86-10901-CM. Appendix Exhibit 21.

On February 22, 1988, a three judge panel of the Michigan Court of Appeals issued an opinion in *Trinova Corp v Michigan Dep't of Treasury*, 166 Mich App 656; 421 NW2d 258 (1988) ("Trinova") which was critical of the Court of Appeals' decision in *J & L*, rejecting the *J & L* holding and finding PA 39 was retroactively applicable to its appellate review of a Court of Claims judgment entered prior to the enactment of PA 39. In an accompanying order of the same date, the *Trinova* panel certified a conflict of the *Trinova* opinion with the *J & L* decision pursuant to Michigan Supreme Court Administrative Order 1984-2.

On February 23, 1988 Court of Claims Judge Carolyn Stell granted a § 69 SBT Refund Claim judgment in *Northern Telecom*, Inc Docket No. 86-10406-CM. After reviewing the Court of Appeals Decision in *Trinova*, Court of Claims Judge Stell found in the alternative that Northern Telecom had factually established the existence of a grossly distorted result under PA 39. Appendix Exhibit 22.

There followed the decision of the Michigan Supreme Court in *Trinova*, which this Court has agreed to review. In that decision, the Michigan Supreme Court rejected the *J & L* rule and found that the apportionment formula relief provision of § 69 was designed to function essentially as a constitutional circuit breaker; acknowledged that taxation of an intrastate activity by an interstate enterprise presents the potential for due process and commerce clause violations; found that § 69 allows the use of an alternate method of apportionment if the apportionment provisions result in the unconstitutional taxation of a unitary business, i.e., to tax the extraterritorial activity of the taxpayer and that the primary role of § 69 is to safeguard the Act and satisfy the basic constitutional foundation of fairness. Opinion, pages 156 and 157. The Court found that the single business tax apportionment process satisfied this Court's requirement that an apportionment formula be externally consistent and rejected proof that the apportionment formula had wrongly subjected to taxation the extraterritorial (to Michigan) activity of *Trinova*, relying upon the fact that the subject of the Act ("Business Activity") "thus encompasses the complete range of entrepreneurial activities of which compensating employees is but one part" (Opinion, page 161) and upon "the integrated nature of formulary apportionment which rejects separate accounting as a means to identify business activity by reference to a discrete geographic boundary" (Opinion, page 162).

ARGUMENT

A. OVERVIEW OF THE SINGLE BUSINESS TAX APPORTIONMENT PROCESS

The Act imposes a specific tax on the adjusted tax base of every person with business activity within the state. MCL 208.31(1); MSA 7.558(31)(1). The tax base consists of various components, including federal taxable income, compensation paid (payroll and fringe benefits), depreciation deducted, interest, royalties and dividends paid, plus other adjustments prescribed by § 9 of the Act. The principal federal tax deductions added back to federal taxable income in arriving at SBT base are compensation (wages and fringe benefits) paid to employees and depreciation. Appendix Exhibit 23. The SBT base, and the components of tax base, may be depicted as follows:

Taxable Business Activity (§ 31(4)) = Tax Base (§ 9) =

TAX BASE COMPONENTS
federal taxable income +
compensation paid +
depreciation deducted +
interest paid +
royalties paid +
other miscellaneous adjustments in § 9

Tax responsibility is thus defined in terms of business activity, which, in turn, is defined by the tax base components of federal taxable income plus most deductions taken in arriving at federal taxable income.

When a taxpayer engages in business activity both inside and outside the state of Michigan, the statute requires an apportionment of the tax base. MCLA 208.41; MSA 7.558(41). A three-factor apportionment formula is used to apportion the tax base. The formula makes a comparison of sales made, property used and payroll

(wages and salaries) paid in Michigan to sales made, property used and payroll paid by the taxpayer everywhere. MCL 208.45; MSA 7.558(45). The apportionment formula may be depicted in the following fashion:

$$\frac{\frac{\text{Michigan Property}}{\text{Total Property}} + \frac{\text{Michigan Payroll}}{\text{Total Payroll}} + \frac{\text{Michigan Sales}}{\text{Total Sales}}}{3} = \text{Average Apportionment Percentage}$$

The formula produces an average apportionment percentage by which the tax base is multiplied, resulting in an approximation of that portion of the business activity, defined in terms of tax base, attributable to Michigan. Adjustments are allowed for certain capital expenditures which are not relevant to the present controversy. The tax rate is then applied to this apportioned, adjusted tax base to determine tax liability. This process is depicted in Exhibit 24.

The SBT apportionment formula is utilized by multistate businesses to approximate taxable business activity within Michigan. However, formulary apportionment may not accurately reflect the level of the taxpayer's activity within the state. Accordingly, the SBT Act contains a relief provision found in § 69. Appendix Exhibit 1. Section 69 provides in relevant part, that "If the apportionment provisions of this Act do not fairly represent the extent of a taxpayer's business activity in this state, the taxpayer may petition for or the commissioner may require, in respect to all *or any part of* the taxpayer's business activity if reasonable: . . . (d) the employment of any other method to effectuate an equitable *allocation and apportionment* of the taxpayer's tax base". (Emphasis added)

In *J & L, supra,* the Michigan Court of Appeals granted the taxpayer § 69 relief from the apportionment provisions of the Act based on the fact that the apportionment provisions unfairly represented the taxpayer's business activity in the state. This unfair representation of business activity was evidenced in the overstatement of the compensation component of tax base, which was the major component (85%-100%) of the tax base being apportioned. The Court held that an apportionment of the compensation component of tax base that was more than fifty percent greater than the actual compensation paid in Michigan was an unfair representation of the taxpayer's business activity in the state. The relief granted in *J & L, supra,* was to allow apportionment of all of the tax base, excluding the compensation component, by the use of the average apportionment percentage, and to add to this apportioned tax base the amount of compensation actually paid in Michigan. The relief granted was a combination of *allocation* of compensation *and apportionment* of remaining tax base to effectuate an equitable attribution of the tax base of *J & L* to Michigan. This court will note that such a bifurcated method of attribution of business activity, utilizing *"allocation and apportionment,"* is specifically contemplated by subsection (d) of § 69. The relief authorized by § 69 may also, by specific authorization of the statute, be granted "in respect to all or *any part* of the taxpayer's business activity". The *J & L* Court was thus operating on solid statutory underpinning in affirming the Tribunal award of § 69 relief.

B. FEDERAL CONSTITUTIONAL REQUIREMENTS FOR THE VALIDITY OF STATE TAX APPORTIONMENT

An apportionment formula relief provision like § 69 is most easily understood against the background of federal constitutional principles concerning the scope and extent of the taxing power of the states. This section of the brief will therefore outline the requirements of the federal constitution as interpreted by this Court to which a state tax apportionment formula must conform.

The Due Process Clause of the 14th Amendment of the U.S. Constitution, US Const, Am XIV, and the Commerce Clause (US Const, Art I, § 8 cl 3) have been interpreted to prohibit a state from taxing "values outside its borders." *Container Corp of America v Franchise Tax Board*, 463 US 159; 103 S Ct 2933; 77 L Ed 2d 545, *reh den*, 464 US 909; 104 S Ct 265 (1983), quoting *ASARCO, Inc v Idaho State Tax Comm'n*, 458 US 307; 102 S Ct 3103; 73 L Ed 2d 787, *reh den*, 459 US 961 (1982). In order to determine what "values" are properly attributable to a given state, this Court has upheld the constitutionality of the use of formulary apportionment methods. *Northwestern States Portland Cement Co v Minnesota*, 358 US 450; 79 S Ct 357; 3 L Ed 2d 421 (1959); *Underwood Typewriter Co v Chamberlain*, 254 US 113; 41 S Ct 45; 65 L Ed 165 (1920). The Due Process Clause (14th Amendment, § 1) and Commerce Clause (Art. I, § 10) of the United States Constitution have both been interpreted by this Court as restricting a state's ability to tax a corporation conducting business activities within and without the taxing state. The Due Process Clause considers the fairness of a state's tax statute by determining whether it results in "extraterritorial values being taxed". *Butler Brothers v McColgan*, 315 US 501, 507; 62 S Ct 701; 86 L Ed 991 (1942). The

Commerce Clause has a broader reach, embracing the Due Process requirement of fairness as well as prohibiting discrimination against interstate commerce. In order to satisfy the Commerce Clause, a state tax on multistate business activities must (i) be applied to an activity with a substantial nexus with the taxing state, (ii) be fairly apportioned (iii) not discriminate against interstate commerce, and (iv) be fairly related to the services provided by the state. *Complete Auto Transit, Inc. v Brady*, 430 US 274; 97 S Ct 1097; 51 L Ed 2d 326 (1977).

Formulary apportionment methods have generally been found to fulfill both the Due Process and Commerce Clause requirements; *Butler Brothers, supra*, (three-factor formula); *Underwood Typewriter Company v Chamberlain, supra*, (single-factor formula); *Moorman Manufacturing Company v Bair*, 437 US 267; 98 S Ct 2340; 57 L Ed 197 (1978)(single-factor formula). However, formulary apportionment has also been recognized as less than precise, achieving only an approximation of a taxpayer's business activity in a particular state. *Moorman Manufacturing Company, supra*. This broad concept thus does not hold that formulary apportionment is per se constitutional and the impact of a state's apportionment method on a *particular taxpayer* must still satisfy the Due Process and Commerce Clauses.

The U.S. Constitution requires that the tax base subject to tax in any state must bear a reasonable relationship to the business activity conducted by the taxpayer within the taxing state. For a formularly apportioned tax to withstand constitutional scrutiny, the 14th Amendment Due Process Clause requires a rational relationship between the tax base attributed to a state and the intrastate values of the enterprise being taxed. *Mobil Oil Corp v Comm'r of Taxes*, 445 US 425, 436-437; 100 S Ct 1223; 63 L

Ed 2d 510 (1980). *Exxon Corp v Wisconsin Dep't of Revenue*, 447 US 207; 100 S Ct 2109; 65 L Ed 2d 66 (1980); *Moorman Mfg Co v Bair, supra*. In analyzing whether such a relationship exists, this Court has stated an apportionment formula must be "fair". *Exxon, supra* at 219. See also, *Moorman, supra*.

In deciding cases involving the validity and legitimacy of state tax apportionment processes, this Court has rejected the notion that judicial scrutiny of the process begins and ends with merely a reference to the label under which the taxing system parades. The leading case on the Commerce Clause in state tax cases is *Complete Auto Transit, Inc., v. Brady, supra*. Therein, this Court stated:

> There is no economic consequence that follows necessarily from the use of the particular words, "privilege of doing business" and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect. 430 U.S. at 288.

In *American Trucking Ass'ns, Inc. v. Scheiner*, 483 US 266, 107 S Ct 2829; 97 L Ed 2d 226 (1987), this Court said:

> In our more recent decisions we have rejected the somewhat metaphysical approach to the Commerce Clause that focused primarily on the character of the privilege rather than the practical consequences of the tax. In 1977, while we recognized that we had invalidated privilege taxes on in-state activity deemed to be part of interstate commerce, we also noted that we had "moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology." 107 S.Ct. at 2846 [Citations and footnotes omitted.]

And further:

> The way in which a tax levied on participants in interstate commerce is *measured and assessed* bears directly on whether it implicates central Commerce Clause values. 107 S.Ct. at 2839 [Emphasis added].

Thus, as shown in A. of this Brief, and as amplified by Appendix Exhibit 23, this Court must ascertain the validity of the single business tax apportionment process by reference to the way in which the single business tax liability of a multistate taxpayer is measured and not end its inquiry at the doorstep of the label which the Michigan legislature and the Michigan Supreme Court have placed upon the single business tax. A tax on "business activity" measured principally by compensation and depreciation expense is a tax on compensation and depreciation.

In its 1983 opinion in *Container, supra*, this Court discussed the two tests of apportionment formula fairness: internal consistency and external consistency. To be internally consistent, a formula must be such that, if applied by every jurisdiction, it would result in no more than all of a taxpayer's business income (or other tax base) being taxed. External consistency requires that the factor(s) used in the apportionment formula must accurately reflect a reasonable sense of how the income (tax base) to be apportioned is generated. 463 US at 169.

This court has recognized that the three-factor apportionment formula is "necessarily imperfect," *Container, supra*, at 183, n 20, yet has upheld various methods as "fair." The three-factor formula was approved in *Butler Bros v McColgan, supra*. However, in *Container*, this court stated, at 170:

> The Constitution does not "invalidat[e] an apportionment formula whenever it *may* result in taxation of some income that did not have its source in the taxing State. . . ." Moorman Mfg. Co., supra, at 272, 98 S Ct 2340, 57 L Ed 2d 197 (emphasis added). See Underwood Typewriter Co., 254 US, at 120-121, 65 L Ed 165, 41 S Ct 45.

> Nevertheless, we will strike down the application of an apportionment formula if the taxpayer can prove "by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportion to the business transacted . . . in that state,' [Hans Rees' Sons, Inc.], 283 US at 135 [51 S Ct 385, 75 L Ed 879] or has 'led to a grossly distorted result,' [Norfolk & Western R. Co. v State Tax Comm'n, 390 US 317, 326 [88 S Ct 996, 19 L Ed 2d 1201](1968)]." Moorman Mfg. Co., supra, at 274, 57 L Ed 2d 197, 98 S Ct 2340.

The context of the *Container* opinion was the apportionment of an income base since that was the measure of the tax. However, the general principle which may be drawn from *Container* is that if the tax base attributed to the taxing state by the apportionment formula is out of all appropriate proportion to the business transacted in that state or the apportionment process leads to a grossly distorted result, application of the apportionment formula will fail under the United States Constitution. A formulary apportionment method which attributes an amount of tax base "out of all appropriate proportion" to the business transacted within the state is prohibited. Such a method lacks the mandated rational relationship between tax base attributed to the state and the intrastate values of the enterprise. Such distortion may result due to a lack of rational relationship between the tax base components being apportioned and the factors of the apportionment formula by which the tax base is apportioned. Absence of this rational relationship runs afoul of the requirements of the Due Process and Commerce Clauses of the Constitution. *Hans Rees' Sons, Inc v North Carolina ex rel Maxwell*, 283 US 123; 51 S Ct 385; 75 L Ed 879 (1930). In this case, the Court found the statutory apportionment formula as

applied to the taxpayer's business for the years in question, " . . . operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant [taxpayer] in that state . . . " (283 US at 135) based on evidence presented by the taxpayer showing that approximately 17% of its income had its source in North Carolina rather than the 66% to 85% apportioned to North Carolina. The Court based its holding on the following ruling:

> When, as in this case, there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may *always* be received which tends to show that a state has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to the transactions within its jurisdiction. 283 US at 134 [Emphasis added].

In *Norfolk & Western R Co v State Tax Comm'n*, 390 US 317; 88 S Ct 995; 19 L Ed 2d 1201 (1968), the Missouri tax apportioned the value of all of the taxpayer's rolling stock among Missouri and other states based on a mileage formula (i.e., miles traveled by all of taxpayer's rolling stock in Missouri relative to miles traveled by taxpayer's rolling stock everywhere). The taxpayer presented evidence showing that the mileage formula yielded a grossly distorted result because some of its rolling stock was used permanently in Missouri whereas much of the rest of the rolling stock was never used in Missouri. In its finding that the tax assessment at issue violated the Due Process and Commerce Clauses, this Court observed:

> Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State. 390 US at 325.

The Court explained that an apportionment formula cannot necessarily be universally applied to all taxpayers without violating constitutional protections because:

> The facts of life do not neatly lend themselves to the niceties of constitutionalism; but neither does the Constitution tolerate any result, however distorted, just because it is the product of a convenient mathematical formula which, in most situations, may produce a tolerable product. 390 US at 327.

The *Norfolk and Western* decision applied the *Hans Rees'* rule as follows:

> We repeat that it is not necessary that a State demonstrate that its use of the mileage formula has resulted in an exact measure of value. But when a taxpayer comes forward with strong evidence tending to prove that the mileage formula will yield a grossly distorted result in its particular case, *the State is obliged to counter that evidence or to make accommodations* necessary to assure that its taxing power is confined to its constitutional limits. If it fails to do so and if the record shows that the taxpayer has sustained the burden of proof to show that the tax is so excessive as to burden interstate commerce, the taxpayer must prevail. 390 US at 329 [Emphasis added].

The Court also said:

> On the other hand, the Court has insisted for many years that a State is not entitled to tax tangible or intangible property that is unconnected with the State . . . The taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to 'project the taxing power of the state plainly beyond its borders . . . 'Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State. 390 US, at 325.

The *Hans Rees* case thus teaches us that a state agency reviewing a challenge brought by a multistate taxpayer to the fairness of the apportionment process must necessarily engage in a review of evidence offered by the taxpayer that the apportionment process, even if fair on its face, has captured tax base which is in no sense attributable to the activity within the taxing jurisdiction. *Norfolk* adds to that teaching by instructing that the State must come forward with evidence that its taxing power has not extended beyond the borders of the taxing state. *Norfolk* further instructs us that the State must make accommodations necessary to insure confinement of the taxing power to constitutional limits. As originally enacted, § 69 provided such an accommodation. However, as interpreted and applied by the Michigan Supreme Court in *Trinova*, amended § 69 does not provide the accommodation necessary to assure taxing power confinement as required by *Norfolk*.

The decisions of this Court allow state taxing processes to look to the activity of a multistate taxpayer as a whole where necessary to ascertain the extent and value of the activity occurring within the taxing state. This Court has made it clear, however, that such a multistate perspective is not intended to allow the taxing state to reach and subject to taxation those activities which occur outside the state. In *Wallace v Hines*, 253 US 66; 40 S Ct 435; 64 L Ed 782 (1920), this Court said:

> The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part

> of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart – not, in other words, to open to taxation what is not within the State.

To sum these constitutional requirements before applying them to the case at bar, it is fair to conclude that although this Court recognizes formulary apportionment is imprecise and yields only an approximation of taxable activity within a taxing state, formulary apportionment generally meets Due Process and Commerce Clause requirements as long as the result is not the taxing of values outside the borders of the taxing state and the apportionment process is fair and not discriminatory. The tax base subject to tax must bear a reasonable relationship to the business activity conducted by the taxpayer within the taxing state and the guarantee of fairness in the process of apportionment is assured, at least in part, by requiring that the factors used in the apportionment formula accurately reflect a reasonable sense of how the tax base to be apportioned (whether income or value added) is generated. Finally, this Court has emphasized that the determination of constitutional acceptability of formulary apportionment is not made by reference to the formal language of the tax statute and the label under which it operates but rather its practical effect and consequences on the taxpayer.

Turning now to an application of these principles to the case at bar, it is clear that the Michigan Single Business Tax apportionment formula fails to meet the constitutional requirements for fairness in the apportionment process in this case. The tax base of Trinova consisted exclusively of compensation expense and depreciation expense in 1980. These expenses are of such a nature that

they can be geographically sourced to locations other than Michigan and are also of such a nature that they can be precisely calculated. In such an instance, it is difficult to imagine why apportionment should even be considered.

Compounding the problem is the fact that the apportionment formula requires these expenses to be imprecisely approximated and attributed to Michigan by reference to the Petitioner's property, payroll and sales factors despite the fact that sales in Michigan bear no rational relationship to the incurral of compensation expense or depreciation expense which is all that is being taxed (the tax base) in 1980. In such an instance, the foregoing constitutional principles render the tax base apportionment attempted in this situation invalid.

The problem in this case arises from the selection of the three factor apportionment formula as the mechanism for attribution of the single business tax base of a multistate taxpayer to Michigan. Except for the payroll factor (which correlates directly to the compensation component of tax base) and to a lesser extent the property factor (which correlates less precisely to the depreciation component of tax base), the three factor apportionment formula does not reflect a reasonable sense of the way in which the tax base of Trinova and Amici is generated in the taxing state. In the instance of Trinova and Amici, the formula is simply unfair in its application. The reasons for which this unfairness arises can be traced to the genesis of the formula.

The source of the three-factor apportionment formula utilized in the SBT Act is the Uniform Division of Income for Tax Purposes Act (UDITPA) drafted by the National Conference of Commissioners on Uniform State Laws and approved by the House of Delegates of the American Bar

Association in 1957. Its purpose and design was to prescribe a uniform method by which the *income* of a multistate taxpayer could be apportioned to the various states. Indeed the prefatory note to UDITPA says: "The Uniform Division of Income for Tax Purposes Act is designed for enactment in those states which levy taxes on or measured by net income". Appendix Exhibit 25.

UDITPA was adopted in Michigan as a portion of the Multi-State Tax Compact Act, 1969 PA 343; MCL 205.581 *et seq;* MSA 4.146(101) *et seq.* UDITPA § 18 is virtually identical to § 69 of the Act as originally enacted. Appendix Exhibits 1 and 26. The editorial comment to UDITPA § 18 contemplated, more than thirty years ago, exactly the type of relief granted by the Tax Tribunal and approved by the Courts in *J & L.* The comment provides, in part, "The phrases in § 18(d) do not foreclose the use of one method for some business activity and a different method for a different business activity". Thus, it was entirely within the purview of § 69(d) that compensation and depreciation in SBT base could be allocated and the remainder of the tax base components could be *apportioned* under a relief provision such as UDITPA § 18 and § 69 of the Act.

Professor William J. Pierce of the University of Michigan Law School authored an article entitled *The Uniform Division of Income for Tax Purposes Act*, 35 TAXES 747 (1957). At page 747, Professor Pierce wrote:

> The Uniform Act deals with the allocation and apportionment of *income* of multistate businesses and is designed for enactment in those states which have either net income taxes or taxes measured by net income . . . .

At page 781, Professor Pierce concludes:

> Section 18 [of UDITPA, which is § 69 of the SBT Act] is a general section which permits the tax

> administrator to require or the taxpayer to petition for some other method of allocating and apportioning the income where unreasonable results ensue from the operation of the other provisions of the Act. *This section necessarily must be used where the statute reaches arbitrary or unreasonable results so that its application could be attacked successfully on constitutional grounds.* Furthermore, it gives both the tax collection agency and the taxpayer some latitude for showing that for the particular business activity, some more equitable method of allocation and apportionment could be achieved. Of course, departures from the basic formula should be avoided except where reasonableness requires. Nonetheless, some alternative method must be available to handle the constitutional problem as well as the unusual cases, because *no statutory pattern could ever resolve satisfactorily the problems for the multitude of taxpayers with individual business characteristics.* (Bracketed material and emphasis added)

Thus, the authors of the three-factor apportionment formula recognized at the outset the observation of this Court that formulary apportionment is necessarily imprecise and imperfect and suggested that a relief mechanism must be built into any apportionment system. Nonetheless, apportionment of income remains the general rule due to the fact that it is practically impossible in most cases to precisely attribute to each state that amount of income earned in each state by a multistate taxpayer. As this Court said in *Container, supra:*

> Allocating income among various taxing jurisdictions bears some resemblance, as we have emphasized throughout this opinion, to slicing a shadow. 463 US at 192.

However, the SBT is not a tax upon income. MCL 208.31(4); MSA 7.558(31)(4) provides, "The tax so levied and imposed is upon the privilege of doing business and

not upon income." The tax base contains federal taxable income only as a starting point. MCL 208.9(1); MSA 7.558(9)(1). As to Trinova, the SBT operates to a predominant extent as a tax upon compensation paid and depreciation deducted. 105% of Trinova's tax base in 1980 consisted of compensation paid to its employees everywhere and 10.52% consisted of depreciation deducted with respect to property located everywhere. Stipulated Facts, 8.

Unlike the difficulty traditionally associated with determining the state by state sources of net income for a multistate taxpayer, the location of employees and assets, the payment of compensation, and the deduction of depreciation can usually be precisely determined and fairly allocated to a particular state.

The apportionment provisions of the Act, when applied to the most significant component of Trinova's tax base, compensation, resulted in an apportionment to Michigan of 3,868% more compensation than its actual Michigan compensation paid. Furthermore, the apportionment formula resulted in an apportionment to Michigan of 96,883% more depreciation than Trinova's depreciation deductions taken on property actually located in Michigan. Application of the apportionment provisions of the Act to Trinova's tax base thus results in taxation of values clearly reposing outside of the borders of Michigan. The distortions demonstrated by Trinova are "out of all appropriate proportion" to actual compensation paid and depreciation deducted for assets located within the state of Michigan by the taxpayer. *Norfolk, supra*. There is clearly no rational relationship between compensation and depreciation apportioned to the state and the amount of compensation and depreciation which Trinova has demonstrated it paid and deducted in

Michigan. Absence of this rational relationship runs afoul of the requirements of the Due Process and Commerce Clauses of the Constitution. Therefore, application of the apportionment formula to the compensation and depreciation components of Trinova's tax base is in violation of both the Due Process and Commerce Clauses of the U.S. Constitution.

In fact, the SBT apportionment formula, when applied to some taxpayers without mitigation under § 69, violates the external consistency requirement of *Container, supra*. External consistency, as one of the two components of fairness of an apportionment formula identified by the Court in *Container, supra*, requires that the factors used in the apportionment formula reflect a reasonable sense of how the tax base to be apportioned is generated. As applied to Trinova, the SBT apportionment formula lacks the requisite external consistency since the factors used to apportion the SBT base, (property, payroll and sales) do not reasonably reflect how that tax base is generated. As with Amici, most SBT taxpayers have a tax base which is comprised principally of compensation paid. Appendix Exhibit 23 indicates that the tax base of a typical SBT taxpayer consists principally of compensation paid (76.77%) with the balance being composed of depreciation, interest expense, business income (5.7%) and other adjustments to tax base in § 9 of the Act. This tax base, composed primarily of compensation paid, is apportioned to the state by the use of an apportionment formula comprised of the property, payroll and sales factors. Despite the fact that the sales factor of the statutory apportionment formula relates only to business income, a relatively insignificant portion of the tax base (5.7%), the sales factor is weighed equally (1/3) along with the other apportionment factors. The factors used to apportion the tax base thus do not reasonably relate to the components

of that tax base, as the apportionment formula does not properly weigh the factors so as to reflect the composition of the tax base. Absence of this relationship between the apportionment factors and the components of tax base indicates a lack of external consistency. The distortive operation of the SBT apportionment formula on Trinova and Amici is thus in violation of the Due Process and Commerce Clauses of the U.S. Constitution.

However, this constitutional issue need not be reached by this Court if Trinova is allowed to show by credible evidence that it is entitled to relief under § 69 of the Act for the reason that apportionment of the compensation and depreciation components of its tax base results in an unfair representation of its business activity within Michigan. The remedy to an unconstitutional reach of the SBT to out of state compensation and depreciation is provided by the Act itself. Section 69 provides the test is whether the apportionment provisions of the Act do not "fairly represent" the extent of a taxpayer's business activity. If so, a modification of the apportionment method is allowed, including a combination of apportionment *and allocation*.

In *Twentieth Century Fox Film Corp v Dep't of Revenue*, 299 Or 220; 700 P2d 1035, 1039-40 (1985), the Supreme Court of Oregon ruled that its statutory equivalent to § 18 of UDITPA was to be applied to remedy situations where the apportionment formula does not fairly represent the business activity of a taxpayer. The Court held that the relief provisions of UDITPA were applicable in two situations: (1) To remedy unconstitutional results; or (2) To provide alternatives to statutory apportionment in cases where the UDITPA formula does not fairly represent the business activity of the taxpayer. *Id.* at 228. *Twentieth Century Fox* illustrates the employment of § 69-type relief

to avoid the necessity of a ruling by this Court on whether the SBT apportionment provisions unconstitutionally tax a multistate taxpayer. The Michigan Supreme Court below, although incorrect in its conclusion that *Trinova* was not subjected to unfair apportionment and discrimination, at least admitted that § 69 was enacted to protect against an unconstitutional application of the apportionment provisions of the Act. This Court should enunciate guidelines to be followed by the Michigan Courts in exercising the power granted by § 69 so that it is allowed to operate to such end.

C. THE *J & L* INTERPRETATION OF § 69 OF THE ACT WAS CONSTITUTIONALLY CORRECT AND CONSISTENT WITH THE DECISIONS OF THIS COURT

Following enactment of the SBT Act in 1976, the Michigan Court of Appeals was faced with interpreting the meaning of "fairly represent the extent of the taxpayer's business activity" for purposes of § 69 of the new Act. What constituted "fairness" for purposes of this section was the sole issue before the court in *J & L, supra*. The Court noted that:

> Respondent contends that fairness is tested by weighing the reasonableness of the taxpayer's final tax liability against the level of its business activity within the state, citing *Armco Steel Corp v Dep't of Revenue*, 359 Mich 430; 102 NW2d 552 (1960) . . . The problem with respondent's proposed test is that it does not focus on the fairness of the *apportionment* provisions of the Act for which § 69 is designed to provide relief. We believe instead that the proper test for invoking § 69 relief is whether the taxpayer's Michigan tax base, as derived from the application of the three-factor apportionment formula to its adjusted tax base, accurately reflects the extent of

the taxpayer's business activity within the state. (Emphasis added) 145 Mich App at 409.

Noting that § 69 of the Act and a prior tax statute were, for pertinent purposes, identical to one another, the court looked to the interpretations of the prior law in determining what is meant by the statement that "the apportionment provisions . . . do not fairly represent the extent of the taxpayer's business activity in this state." 145 Mich App at 410. The Court emphasized that, "The inquiry does not turn on the end result, i.e., tax liability. Rather, it turns on whether the basis for computing tax liability is fair, i.e., is the business activity subject to taxation accurately reflected by application of the three-factor formula?" *Id.*, at 412.

In its brief to this Court in opposition to the Writ, Respondent argued that the tax that would be paid by Trinova under the statutory formula was not an unreasonable tax burden considering the amount of sales made in the state, a subjective concept of fairness. (P. 26 of Respondent's brief to this Court).

The Michigan decisions, prior to the *Trinova* decision of the Michigan Supreme Court below, had traditionally rejected this mode of analysis. In *J & L*, the Court said:

> In *Donovan [Donovan Construction Co v Department of Treasury*, 126 Mich App 11; 337 NW2d 297 (1983) *lv den* 419 Mich 894 (1984)] and *Payne and Dolan [of Wisconsin, Inc v Department of Treasury*, 138 Mich App 418; 360 NW2d 208 (1984)], the Treasury Department based its request for relief primarily on a showing of gross disparity in tax liability results and not on a showing that the apportionment formula distorted business activity within the state. Therefore, this Court denied relief. Similarly, because the burden of showing distorted activity was not met in *International Telephone & Telegraph Corp, supra*, the

> corporation was not entitled to relief in computing franchise fees. The basis for denial of relief in these cases was *not*, as Respondent suggests, that the resulting franchise fee or tax liability seemed reasonable or not excessive. The inquiry does not turn on the end result; i.e., tax liability. Rather, it turns on whether the basis for computing tax liability is fair; i.e., is the business activity subject to taxation accurately reflected by application of the three-factor formula. (Bracketed material added). 147 Mich App, at 412.

J & L contended that inclusion of the compensation component in the tax base to which the statutory formula was applied resulted in the attribution to Michigan of far more compensation than was actually paid in the state. Based on this contention, *J & L* requested relief under § 69, asking the Commissioner to allow direct allocation of compensation actually paid in the state by the taxpayers, and an apportionment of the remaining components of the SBT base by use of the statutory formula. The Court of Appeals affirmed the decision of the Tribunal holding that the Commissioner erred in denying the requested relief. The Tribunal emphasized two stipulated facts which demonstrated that the three-factor formula unfairly represented business activity in Michigan: the apportionment formula attributed substantially more compensation (50 percent) to Michigan than was actually paid in Michigan, and the compensation attributable to Michigan could be precisely calculated. The Court of Appeals concluded that:

> Petitioners did not merely show a gross disparity in tax liability depending on the accounting method employed. Instead, based on the stipulated facts, petitioners presented evidence which demonstrated that the three factor formula over-apportioned or excessively attributed compensation to Michigan. The facts revealed that the compensation component of business activity subject to taxation was overstated by

> approximately fifty percent. As required by *Donovan, supra,* petitioners presented clear and convincing evidence 'that the statutory formula inadequately or inaccurately represent[ed] [their] unitary business activity in the taxing state'. 145 Mich App at 413.

This Court, in *Container, supra,* has affirmed the fact that the proper focus is not on the end result of an application of the apportionment process, but on the integrity of the process itself. By looking at the external consistency of an apportionment formula, the Court focuses on the fairness of the apportionment process, and not on a subjective test of the reasonableness of resulting tax liability. Amici therefore respectfully suggest that this Court ignore the temptation offered by Defendant to make a determination in this case based upon a comparison of tax liability or whether the tax result seems fair in relation to Trinova's sales in Michigan. That is not the standard advanced under § 69 of the Act nor by the decisions of this Court. This Court should decline the invitation of Defendant to deviate from the *Container* analysis in deciding this case.

Finally, it should be noted that the decision of the Court of Claims in *Trinova* was made as contemplated by the statute. The very existence of an apportionment formula relief provision such as § 69 anticipates that the Commissioner of Revenue and, ultimately, the Courts are to exercise the powers granted in § 69 to remedy those situations which a finder of fact determines to be "unfair". The Court of Claims was not engaged in an extraordinary activity in any sense. The statute provides for apportionment formula modifications. The power is to be exercised in factual circumstances determined by the finder of fact to be "unfair". The Court of Claims was thus completely within the bounds of the authority

granted by the statute in awarding the relief which Trinova was seeking.

SUMARY OF ARGUMENT

To be valid, a state tax on interstate commerce must, among other things, not result in taxing values outside the taxing state. Further, the formula used must contain factors which rationally relate to the tax base being apportioned and how it is generated. The tax at issue fails this standard as to Trinova and Amici, and a modification of the apportionment process such as requested by Trinova and Amici is therefore required.

CONCLUSION

The claim of Trinova which is presented to this Court is based upon the unfair apportionment of Trinova's single business tax base in 1980. Trinova also claims that the single business tax apportionment formula discriminates against taxpayers domiciled outside of the State of Michigan due to the composition of the tax base and the application of equally weighted apportionment factors to that tax base. The discrimination claim is premised upon the adoption of an unfair system of apportionment of a value added tax base designed to promote development and investment within the State of Michigan. As to Trinova and Amici, superimposing the three factor income tax apportionment formula on the single business tax base consisting in the main of non-income related business expenses produces an unfair representation of the business activity of Trinova and Amici. In such a circumstance, the decisions of this Court require that an accommodation be provided to such taxpayers in order to assure that the taxing power of Michigan is confined to

its constitutional limits. A statutory vehicle for such an accommodation exists in the form of § 69 of the Act.

When interpreted in light of the foregoing constitutional adjudications of this Court concerning apportionment, § 69 of the Act, whether before or after amendment, requires an accommodation by the Respondent of an unfair representation of business activity by apportionment which is out of all appropriate proportion to business transacted in the state or which leads to a grossly distorted result. When thus interpreted consistently with the foregoing constitutional determinations of this Court, the objectives of fair apportionment and non-discriminatory taxation of interstate commerce expressed by this Court in *Complete Auto Transit, supra,* may be achieved. For the foregoing reasons, the judgment of the Supreme Court of Michigan in this case should be reversed.

Respectfully submitted,

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April 27, 1990

APPENDIX TO AMICUS CURIAE BRIEF OF ALCAN ALUMINUM CORPORATION, ET AL.

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Exhibit 1—§ 69

208.69. RELIEF AS TO TAX BASE

Sec. 69. (1) If the apportionment provisions of this act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the commissioner may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) Separate accounting.

(b) The exclusion of any 1 or more of the factors.

(c) The inclusion of 1 or more additional factors which will fairly represent the taxpayer's business activity in this state.

(d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's tax base.

(2) An alternate method will be effective only if it is approved by the commissioner.

Exhibit 2—MTT—"J & L"

STATE OF MICHIGAN
MICHIGAN TAX TRIBUNAL

Jones and Laughlin Steel Corporation, Petitioner	)	
v	)	MTT Docket No. 57892
Michigan Department of Treasury, Respondent	)	
and	)	
Wilson Foods Corporation, Petitioner	)	
v	)	MTT Docket No. 57893
Michigan Department of Treasury, Respondent	)	

OPINION AND JUDGMENT

Tribunal Judge Present
Charles P. McDonald

This matter having come on for hearing before Hearing Officer Roger M. Groves, and briefs having been filed and a Proposed Judgment having been issued from which exceptions and written arguments thereto were filed, and The Tribunal having considered all matters raised and being fully familiar in the premises, does hereby adopt and incorporate by reference the findings of fact and conclusions of law in the said Proposed Judgment, issued April 6, 1984, as the *final* decision of the Tribunal, except as noted hereinafter.

Exhibit 2—MTT—"J & L"

The taxpayers have noted that if the Section 69 relief is granted, they will withdraw from consideration the remaining issues presented. Among such remaining issues is that related to the number of statutory exemptions authorized under Section 35(2) to members of an affiliated group. By stipulation, taxpayers have acknowledged that they were affiliated as defined in Section 3(1) of the Act, but argue that both are entitled to an exemption on the grounds that the statute limiting them to a single exemption is unconstitutional.

This Tribunal does not have the requisite jursdiction to declare a statute unconstitutional; see *Henshaw v State Tax Commission* (*on remand*), 126 Mich App 806, 810; — NW2d — (1983). Accordingly, assuming the statute constitutional and in the absence of any factual dispute remaining, the Tribunal must find only a single exemption allowable, and a revised assessment appropriate.

In all other respects the facts and conclusions in the Proposed Judgment are ADOPTED pursuant to Section 26 of the Tax Tribunal Act.

Judgment

IT IS HEREBY ORDERED AND ADJUDGED that Assessment Numbers B502664 and B506830 be and are hereby CANCELLED.

IT IS FURTHER ORDERED AND ADJUDGED that a revised assessment be issued by Respondent pursuant to allowance of a single statutory exemption.

MICHIGAN TAX TRIBUNAL
By /s/ Charles P. McDonald

Entered: September 5, 1984

Exhibit 2—MTT—"J & L"

STATE OF MICHIGAN
MICHIGAN TAX TRIBUNAL

Jones & Laughlin Steel Corporaton, Petitioner	)	
v	)	MTT Docket No. 57892
Michigan Department of Treasury, Respondent	)	Assessment No. B502664
and	)	Account No. 25-0580280
Wilson Foods Corporation, Petitioner	)	
v	)	MTT Docket No. 57893
Michigan Department of Treasury, Respondent	)	Assessment No. B506830
	)	Account No. 73-0955617

PROPOSED JUDGMENT

Hearing Officer Presiding
Roger M. Groves

Findings of Fact

In this cause a Stipulation of Facts was entered by the parties in contemplation of four issues in controversy. An evidentiary hearing was held regarding the primary issue of whether the Petitioners' single business tax returns properly included an alternative formula under Section 69 of the Single Business Tax Act ("Act"), MCL 208.1 *et seq.;* MSA 7.558(1) *et seq.*, to the statutory three

Exhibit 2—MTT—"J & L"

factor apportionment formula used by the Respondent. Briefs by the parties concerning all contested issues were filed by August 17, 1983.

Both Petitioners were incorporated under the laws of a state other than Michigan; Jones & Laughlin Steel Corporation (hereinafter J & L Steel) in Pennsylvania, and Wilson Foods Corporation (hereinafter Wilson) in Delaware. The principal offices of the Petitioners were also foreign to Michigan, being Pittsburgh, Pennsylvania and Oklahoma City, Oklahoma, respectively. During the tax years in controversy, J & L Steel was engaged in the manufacture of steel and related steel products, which it sold on a nationwide basis. Wilson, during the same relevant tax period, was engaged in the business of manufacturing and selling meat and related meat products, also marketed on a nationwide basis. The Michigan business activities of both Petitioners were primarily the operation of marketing and sales offices. Additionally, J & L Steel had a manufacturing plant in Warren, Michigan. The primarily sales force of J & L Steel has been in Troy, Michigan, with a retail sales outlet in Kalkaska, Michigan. (J & L Stipulation of Facts, paragraph 1, 2 and 3.)

The tax years in controversy are calendar years 1976, 1977 and 1978. (J & L Steel Stipulation of Facts, paragraph 4; Wilson Stipulation of Facts, paragraph 4.)

The cumulative amount in controversy, exclusive of interest, is $556,697 for J & L Steel and $37,694 for Wilson. Notices of Final Assessment to both taxpayers, issued on the same date, September 21, 1981, being No. B502664 and B506830, respectively, reflect those amounts.

For all years in question, both taxpayers utilized the three factor formula from Chapter 3 of the Act when apportioning the business income portion of their respective tax base. Both taxpayers, however, allocated to Michigan the *compensation* portion of their tax base on their SBT returns for all three years, rather than apportion to Michigan, based on total compensation. (J & L Steel's returns are Exhibits P-1, P-2 and P-3; Wilson's returns are Exhibits P-4, P-5 and P-6).

The parties have stipulated that the amount of Michigan compensation for J & L Steel for all years in question was as follows:

Year	Michigan Compensation
1976	$26,385,639
1977	21,629,704
1978	21,782,621

The Michigan compensation of Wilson was also stipulated between the parties for all controverted years:

Year	Michigan Compensation
1976	$91,642
1977	58,811
1978	82,215

(See J & L Steel Stipulation of Facts, paragraph 25 and Wilson Stipulation of Facts, paragraph 25.)

Thus, the amount of compensation attributable to Michigan was known and finitely determined for both taxpayers for all years in question.

Pursuant to audit, the Respondent redetermined the taxpayers' tax base using the three-factor formula to apportion each taxpayer's total compensation rather than allow a specific allocation to Michigan of the admittedly Michigan compensation. The single business tax base for both taxpayers was significantly increased under the compensation apportionment. Respondent's determination of apportioned conmpensation for J & L Steel was as follows:

Tax Year	Michigan Apportioned Compensation
1976	$39,902,544
1977	38,662,908
1978	33,739,177
	(Exhibit P-9)

The corresponding amounts of apportioned compensation as determined for Wilson were as follows:

Tax Year	Michigan Apportioned Compensation
1976	$2,075,400
1977	1,946,831
1978	2,137,480
	(Exhibit P10)

These amounts of compensation represent a substantial majority of the SBT tax base of both taxpayers.[1]

Both taxpayers also calculated their respective excess compensation deductions under Section 31(5) of the Act by utilizing an apportioned tax base, rather than an unapportioned tax base, when determining their "total tax base". The total tax base that would result under both

---

[1]The apportioned compensation comprised between 84.68% and 93.58% of the J & L Steel tax base for the three years, and between 96.57% and 100.99% of the Wilson tax base. (Paragraph 9 of both Stipulations of Fact.)

methods was noted in paragraphs 33 and 34 of the Stipulations of Facts of both parties. (See also Petitioner's Principal Brief, page 7.)

Both taxpayers also excluded from "compensation" as defined in Section 4(3) of the Act amounts of money that are accruals to fund pension, retirement and/or profit sharing plans *prior* to the effective date of the Act.

The parties have also stipulated with Respondent that the taxpayers were "affiliated corporations" as defined in Section 3(1) of the Act, for purposes of determining whether each taxpayer is entitled to the Section 35 statutory exemption. (J & L Steel Stipulation paragraph 35; Wilson Stipulation, paragraphs 35 and 36.)

Both taxpayers requested relief from the use of the apportionment formula under the Act pursuant to Section 69 of the Act. Such requests were denied, giving rise to the cases before this Tribunal.

The taxpayers specifically note on the record and in their collective principal brief that if the Section 69 relief is granted, the taxpayers will withdraw from consideration the other three issues presented in the brief. Regarding those secondary issues, the taxpayers contend (1) that "total tax base" as used in the calculation of the excess compensation deduction [Section 31(5)] was intended to mean "tax base" after apportionment; (2) that accruals of contributions of the taxpayers to retirement plans and other elements of "compensation" as defined in Section 4(3) of the Act cannot be included as compensation when the services that gave rise to the accruals occurred prior

to the effective date of the Act; and (3) that both taxpayers, through members of an affiliated group, still cannot be denied the statutory exemption authorized under Section 35(2). To deny same unconstitutional creates an artificial distinction between affiliated taxpayers and non-affiliated taxpayers who admittedly are similarly situated. While the statute doesn't allow both taxpayers the exemption, the statute is urged as unconstitutional.

Conclusions of Law

The primary issues in this case are: (1) whether the 3-factor formularly apportionment provisions under Section 45 of the Act fairly represent the extent of the taxpayers' respective business activity in Michigan; (2) if not, does the method utilized by the taxpayers in filing their separate SBT returns or the additional methods suggested by taxpayers at hearing, provide a substantially more accurate representation of the extent of the taxpayers' business activity in Michigan. This Tribunal holds that the statutory apportionment formula does *not* fairly reflect the extent of business activity for either taxpayer and that the taxpayers' alternative method in their returns is substantially more accurate in exsecting the Michigan business activity of the taxpayers. Accordingly, relief from the Section 45 apportionment formula is granted under Section 69 of the Act, and is supported by taxpayers' alternate method utilized in its SBT returns.

The statutory apportionment formula provides that "all of the tax base" of a Michigan multi-state taxpayer, except the tax base derived from certain services not applicable

in the instant case or specifically allocated, shall be apportioned to Michigan "by multiplying the tax base by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3". MCL 208.45; MSA 7.588(45).

Section 69 of the Act provides as follows:

> Sec. 69. (1) If the apportionment provisions of this act *do not fairly represent the extent of the taxpayer's business activity in this state*, the taxpayer may petition for or the commissioner may require, in respect to all or *any part* of the taxpayers' business activity, *if reasonable:*
>
> (a) Separate accounting.
>
> (b) The exclusion of any 1 or more of the factors.
>
> (c) The inclusion of 1 or more additional factors which will fairly represent the taxpayer's business activity in this state.
>
> (d) The employment of *any other method* to effecuate an equitable *allocation* and apportionment of the taxpayer's tax base.
>
> (2) An alternate method will be effective only if it is approved by the commissioner. MCL 208.69; MSA 7.558(69) (Emphasis Supplied).

In the instant case, it cannot be held that the apportionment formula in the Act fairly represents the extent of either taxpayer's business activity, when the stipulated actual compensation of J & L Steel is between $12,000,000 and $17,000,000 *less* than the apportionment formula would indicate for each of the three years at issue (Exhibit P-9); and when Wilson's stipulated a actual compensation

is approximately $2,000,000 *less* than the State's apportionment formula attribution to Wilson's Michigan business activity, for each year in question. The apportioned compensation exceeded the actual Michigan compensation by greater than 50% for each taxpayer for every year at issue.

It is significant to note that the pragmatic analysis immediately above is not inconsistent with the theoretical underpinnings of this state's apportionment formula, and the circumstances under which relief from the formula is appropriate. As discussed at length in an earlier Tribunal case[2] dealing with corporate income tax, a forerunner to the SBT Act with virtually the same apportionment formula, Michigan's apportionment formula and relief provisions are derived from the Uniform Division of Income for Tax Purposes Act (UDITPA) and the Multistate Tax Compact (MTC). Michigan has adopted the latter, effective 1970, see 1969 PA 343, MCL 205.281 *et seq.;* MSA 4.146(101) *et seq.* It appears clear that the 3-factor apportionment formula from those sources was designed to be a reasonable statistical *approximation* of each state's equitable share of income of a multistate taxpayer; such a result being necessary because of the extreme difficulty in determining the exact amount of net income by multistate taxpayers attributable to a particular state. Altman and Keesling, *Allocation of Income in State Taxation,* (CCH, 1946, p 108.) The testimony of Mr. Burns Stanley, who

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[2] *Payne & Dolan of Wisconsin, Inc v Department of Treasury,* MTT Docket No. 73934 (1983).

has had extensive experience in apportionment and allocation matters, (Exhibits P-7 and P-8 detail that experience) underscored that point. The utopian result, if the uniform method was utilized in each state was described as follows:

> "The Uniform Act, if adopted in every state having a net income tax or a tax measured by net income, would assure that 100 percent of income, and no more or no less would be taxed." Pierce, *The Uniform Division of Income for State Tax Purposes,* 35 Taxes 747, 748 (1957).

Consistent with the apportionment formula is the necessity for a relief provision. As the taxpayers state in their principal brief, the primary draftsman of UDITPA notes that the relief provision is necessary "where reasonableness requires", in order to accommodate the unusual cases and constitutional entanglements. Pierce, *The Uniform Division of Income for State Tax Purposes,* 35 Taxes 747 (1957). The instant case is the unusual circumstances where the compensation of each taxpayer comprises between 84.68% and 100% of their respective Michigan tax base, all [of] which has been identified and stipulated between the taxpayers and the taxing entity. Where the amount of compensation attributable to a state is known, it is not, in this Tribunal's view, a reasonable or fair representation of state activity to approximate the compensation at over 50% of the actual amounts. It would also be constitutionally troublesome for one state to tax a *substantial* amount of income not generated within the state's borders.

Greyhound Lines, Inc. and Affiliates v. Department of Treasury, Michigan Board of Tax Appeals, Docket No. 976, 1720 (1977).

Having found that the 3-factor formula does not fairly represent the business activity of the taxpayers in this case, it is next necessary to determine whether any of the three alternative methods advocated by these taxpayers comport with the Section 69 relief provision. That provision clearly authorizes an alternate method "in respect to . . . *any part* of the taxpayer's business activity, *if reasonable*" [Section 69(1)].

In this matter, the only part of the taxpayers' business activity altered by their alternate method is the compensation attribution. Under the taxpayers' method, that component is specifically allocated since it is finitely known. The taxpayers do not herein quarrel with the apportionment formula application against all other components of SBT tax base, which were not finitely quantified.

Section 69 also specfically authorizes "any other method" to produce an "equitable *allocation* and apportionment of the taxpayer's tax base". [Section 69(1)(d)].

That provision should be construed to allow the flexibility to combine allocation and apportionment as long as it reasonably reflects the taxpayer's business activity. That combination in this case appears to have accomplished that result because the allocation has eliminated a substantial amount of compensation, which is admittedly not part of the Michigan tax base.

Since the taxpayers' method combines allocation and apportionment, and since the Act also provides for statutory

allocation and apportionment, it is important to distinguish between the taxpayers' use of allocation as only a part of its alternate apportionment formula, and the statutory allocation, which is designed to distribute the entire tax base. Allocation, most fundamentally, means to allot, distribute or assign, *Jacobson v Bowles,* 53 FSupp 532, 534, income property, etc., to one state while apportionment means to divide and distribute proportionally income among different states. *Black's Law Dictionary* 4th Ed (1968), p 128. The allocation formula, which evolved from the UDITPA model, provides that income which has its source entirely from within one state is allocated to that state. Altman and Keesling, *Allocation of Income in State Taxation, supra*[3]. Similarly, under the Act, if all of a taxpayer's business activity is confined to Michigan, the tax base is allocated entirely to Michigan. MCL 208.40; MSA 7.558(40). The historical necessity for apportionment in state income tax jurisprudence, however, was noted by the same source to have arisen in the following context:

> "It is *only the income derived from a source which crosses state lines,* such as business operations extending into more than one state, to which a rule of apportionment must be applied." (Emphasis Supplied).

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[3]To avoid semantic confusion, the application of apportionment could be said to result in allocating X amount to State A, and Y amount to State B (meaning that a particular state received the whole amount due it, though the rest of the business activity of the multistate taxpayer is apportioned among other states, each state getting its allocated share.

It follows that under the single business tax, only business activity that extends to non-Michigan sources is necessarily apportioned. Because in this case, 85-100% of each taxpayer's tax base is compensation confined solely to Michigan, there is no need to apportion that segment of business activity. Rather, the compensation should be allocated since it is almost entirely from Michigan sources. This use of allocation is not the statutory allocation scheme under the Act. Section 40 only codifies allocation in the context of a self-contained method where the entire tax base is confined to Michigan. That statutory allocation formula should not be construed as the only permissible use of allocation. The Act's own relief provision allows for "*any* other method" relating to "all or *any* part" of the business activity.

Having accepted the method advocated by the taxpayers as their first alternative, which is the method utilized in filing their respective SBT returns in each year in question, the Tribunal need not address the other alternative methods set forth by the taxpayers.[4]

Similarly the taxpayers set forth alternate issues in the event the Section 69 relief was not granted. Consistent

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[4]The taxpayers' other methods involved the use of (1) a single factor payroll formula, since the difference between payroll and compensation is very small in this case, and compensation is practically all of the tax base; and (2) reducing the sales factor by 50%, thereby reducing the apportioned sales factor to comport with the actual compensation in Michigan. Thus, all three apportionment factors would be utilized, but one would be modified to reduce the distortion.

with taxpayers' statement of withdrawal of those issues if they prevailed on the principal issue, those issues are not herein resolved.

Respondent's assertion that the Section 69 relief was not requested is unpersuasive. The Respondent has not promulgated rules or prescribed forms for such a request, though authorized, if not required to do so under Section 104(1) of the Act. Nonetheless, the taxpayers did utilize the alternate method in filing their return and did make a request at the departmental informal conference prior to the issuance of the Final Assessment. That request was ruled upon by the Respondent's Decision and Order of Determination in both cases. See, also, *Acco Industries, Inc v Department of Treasury*, MTT Docket No. 40141, 40252, 57826, 57689, at pages 12, 13.

The taxpayers' burden of proof in this single business tax case is wholly analogous to the burden involving the former corporate income tax with regards to relief from the three-factor apportionment formula. Under that former tax, the Michigan Court of Appeals recently stated:

> The party seeking to employ the alternate apportionment method has the burden of showing that the formulary apportionment is inappropriate by clear and convincing evidence. See *Butler Bros v McColgan*, 315 US 501; 62 SCt 701; 86 LEd 991 (1942), *St Johnsbury Trucking Co, Inc v New Hampshire*, 385 A2d 215, 217 (NH, 1978), *Deseret Pharmaceutical Co, Inc v State Tax Comm*, 579 P2d 1322, 1326 (Utah 2d, 1978). See generally, Keesling & Warren, *California's Uniform Division of Income for Tax Purposes Act (Part I)*, 15 UCLA L Rev 156 (1967). Evidence introduced to overcome the formula method of allocation must address each element of the formula's equation. *Butler Bros v McColgan*, 111 P2d 334, 341 (Cal 2d, 1941),

> *aff'd* 315 US 501; 62 SCt 701; 86 LEd 991 (1942). *Donovan Construction Company v State of Michigan*, 126 Mich App 11, 21; 337 NW2d 297 (1983).

In the instant case, the stipulated Michigan compensation in relation to the uncontroverted amount of apportioned compensation provides clear and convincing evidence showing the inappropriateness of the formulary apportionment. Each element of the formula's equation was addressed by the taxpayers as the noncompensation components of the tax base was determined with the formula, and compensation was allocated.

Judgment

IT IS HEREBY ORDERED AND ADJUDGED that assessment numbers B502664 and B506830 be and are hereby CANCELLED.

IT IS FURTHER ORDERED AND ADJUDGED that the parties to this cause of action shall have 20 days from date of entry of this Proposed Judgment to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act [MCLA 24.281; MSA 3.560(181)]. The parties in presenting exceptions and written arguments shall limit them to the evidence and testimony presented to the hearing officer. This Proposed Judgment together with any exceptions and written arguments shall be considered by the Tribunal in arriving at a final decision in this matter pursuant to Section 26 of the Tax Tribunal Act [MCLA 205.726; MSA 7.650(26)]

MICHIGAN TAX TRIBUNAL
By /s/ Roger M. Groves
Hearing Officer

Entered: April 6, 1984

Exhibit 3—Order Denying Leave

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 18th day of March in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable

G. MENNEN WILLIAMS,
Chief Justice

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,
DENNIS W. ARCHER,
Associate Justices

77291
& (23)
77292
& (22)

JONES & LAUGHLIN STEEL CORPORATION,

Petitioner-Appellee,

v

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

SC: 77291
CoA: 80472
MTT: 57892

WILSON FOODS CORPORATION,

Petitioner-Appellee,

v

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Exhibit 3—Order Denying Leave

SC: 77292
CoA: 80473
MTT: 57893

On order of the Court, the motion by the Motor Vehicle Manufacturers Association of the United States, Inc, to file a brief as amicus curiae in support of the application for leave to appeal is considered, and it is GRANTED. The application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 18th day of March in the year of our Lord one thousand nine hundred and eighty-six.

/s/ Corbin R. Davis Clerk.

SEAL

Exhibit 4—Order Denying Reconsideration

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 22nd day of October in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable

G. MENNEN WILLIAMS,
Chief Justice

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,
DENNIS W. ARCHER,
Associate Justices

77291(27)
77292(27)

JONES & LAUGHLIN STEEL CORPORATION,

Petitioner-Appellee,

v

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

SC: 77291
COA: 80472
MTT: 57892

WILSON FOODS CORPORATION,

Petitioner-Appellee,

v

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

SC: 77292
COA: 80473
MTT: 57893

Exhibit 4—Order Denying Reconsideration

On order of the Court, the motion for reconsideration of this Court's order of March 18, 1986 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Boyle and Archer, JJ., would grant reconsideration and grant leave to appeal.

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 22nd day of October in the year of our Lord one thousand nine hundred and eighty-six.

/s/ Jacqueline B. MacKinnon
Deputy Clerk.

SEAL

Exhibit 5—Armco

STATE OF MICHIGAN
COURT OF CLAIMS

ARMCO, INC.,

Plaintiff,

v

Case No. 84-9612

STATE OF MICHIGAN,
DEPARTMENT OF TREASURY,
REVENUE DIVISION,

Defendant.

_____/

JUDGMENT ORDER

(Filed June 11, 1986)

At a session of said Court, held in the Town Center Building, Lansing, Michigan, on the 11th day of June, 1986.
PRESENT: HONORABLE MICHAEL G. HARRISON, CIRCUIT JUDGE

This Court, having reviewed evidence presented in this proceeding relating to the request of Plaintiff for relief under Section 69 of the Michigan Single Business Tax Act, 1975 P.A. 228, MCL 208.1 *et seq*, MSA 7.558 (101) *et seq* (herein the "Act"); and

This Court having heard testimony presented by James D. Ryan, senior tax attorney for Armco, Inc., and

This Court having also reviewed the pleadings, the Stipulation of Facts presented to this Court by the parties as well as Plaintiff's Exhibits 1 through 8 and Defendant's Exhibits 1 through 7; and

Exhibit 5—Armco

This Court further finding that application of the statutory three factor apportionment formula against the compensation component of Plaintiff's tax base excessively attributes compensation to Michigan by more than 600% when compared with what the parties have stipulated to have been Plaintiff's Michigan actual compensation for each of the years here at issue; and

This Court further finding that the alternative assignment of compensation as reflected more particularly in Plaintiff's Exhibit 6 will more fairly represent Plaintiff's business activity in this State for each of the years here at issue;

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. In order to more fairly represent Plaintiff's business activity in Michigan for its tax years 1977, 1978, 1979, 1980, 1981 and 1982, Plaintiff is entitled to relief under Section 69 of the Single Business Tax Act.

2. The measure of the relief to which Plaintiff is entitled is represented by methodology outlined in Plaintiff's Exhibit 6; which applies the three factor apportionment formula under the Act to all components of Plaintiff's tax base except for compensation where, instead of apportionment, there is allocated to this state for each of the years here at issue Michigan actual compensation in the following amounts: 1977, $2,349,074; 1978, $2,454,479; 1979, $2,252,491; 1980, $2,239,340; 1981, $2,465,810; 1982, $2,214,554.

Exhibit 5—Armco

3. As the Section 69 relief to be accorded Plaintiff by allocating compensation to the extent indicated above in paragraph 2 of this Order, Defendant shall refund to Plaintiff One Million Six Hundred Twenty-five Thousand Two Hundred Fifteen and No/100 ($1,625,215.00) Dollars of single business tax, in the aggregate, for all years covered by this dispute, together with interest at the applicable statutory rate.

/s/ Michael G. Harrison
Michael G. Harrison
Circuit Judge

APPROVED FOR ENTRY:

/s/ Charles E. Liken
Charles E. Liken
Assistant Attorney General

Exhibit 6—Friendly

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

FRIENDLY ICE CREAM CORPORATION

Plaintiff,

v Case No. 86-10413-CM

MICHIGAN DEPARTMENT OF TREASURY,

Defendant. HONORABLE CAROLYN STELL

David D. Waddell (P36814)
Fraser Trebilcock Davis & Foster, P.C.
Attorneys for Plaintiff
1000 Michigan National Tower
Lansing, Michigan 48933
(517) 482-5800

ORDER AND JUDGMENT

(Filed February 4, 1987)

At a session of the Court of Claims held in the City of Lansing, Ingham County, State of Michigan on the 24th day of January, 1987.

This matter having come to be heard on Plaintiff's Motion for Summary Disposition, the Court having reviewed the Motion and supporting briefs and briefs in opposition and having heard oral argument by counsel for both parties;

IT IS HEREBY ORDERED AND ADJUDGED that Summary Disposition is granted in favor of Plaintiff with respect to the 1981 and 1982 tax years against Defendant in the amount of $20,698.00 plus interest as allowable by law.

Exhibit 6—Friendly

FURTHERMORE IT IS ORDERED AND ADJUDGED that Summary Disposition is granted in favor of Defendant with respect to the 1983 and 1984 tax years against Plaintiff.

FURTHERMORE IT IS ORDERED AND ADJUDGED that no costs or attorneys fees shall be awarded to either party.

/s/ Carolyn Stell
Honorable Carolyn Stell
Court of Claims Judge
Approved as to form only:

/s/ David D. Waddell
David D. Waddell
Attorney for Plaintiff
Approved as to form only:

/s/ Charles E. Liken
Charles E. Liken
Attorney General

Exhibit 7—MTD

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

MTD PRODUCTS, INC,
an Ohio Corporation,

Plaintiff, File No. 86-10416-CL

v HON. ROBERT HOLMES BELL

MICHIGAN DEPARTMENT OF TREASURY,

Defendant.

OPINION AND ORDER OF THE COURT

This is an action under MCL 208.88; MSA 7.588(88) to recover taxes paid by plaintiff. Now before the Court is plaintiff's motion for summary disposition, asserting there is no genuine issue of material fact and that plaintiff is entitled to judgment as a matter of law. MCR 1985, 2.116(C)(10).

Plaintiff is an Ohio corporation which does business in Michigan. For the privilege of conducting business in Michigan during tax years 1980, 1981, 1982 and 1983, plaintiff paid a total tax of $201,932 under the Single Business Tax Act. On July 31, 1985, plaintiff filed amended single business tax returns for each of the above four years, seeking refund in total of $116,824. The Department of Treasury ("Department") denied plaintiff's request for a refund on November 5, 1985.

I

The Single Business Tax Act ("Act"), MCLA 208.1 *et seq.*; MSA 7.558(1) *et seq.*, imposes a specific tax on

the adjusted tax base of every person who conducts business in Michigan. The "adjusted tax base" is essentially federal taxable income, subject to certain additions and subtractions enumerated at § 9 of the Act. One of these "adjustments," at § 9 (5), requires the taxpayer to add compensation paid its employees to its taxable income. Thus, compensation becomes a part of the adjusted tax base. In order to determine what portion of the adjusted tax base of a corporation like plaintiff, which conducts business within and without Michigan, is taxable as Michigan business activity, a three-factor apportionment formula is applied. Section 45 of the Act provides:

> All of the tax base, other than the tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3.

Application of this apportionment formula is designed to produce a reasonable *approximation* of the share of a multi-state taxpayer's business activity which is attributable to Michigan. Because the resultant approximation may be more or less accurate, depending on taxpayer-specific circumstances, relief from the apportionment formula is sometimes available under § 9 of the Act:

> (1) If the apportionment provisions of this act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the commission [sic] may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

> (a) Separate accounting.
>
> (b) The exclusion of any 1 or more of the factors.
>
> (c) The inclusion of 1 or more additional factors which will fairly represent the taxpayer's business activity in this state.
>
> (d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's tax base.
>
> (2) An alternate method will be effective only if it is approved by the commissioner.

The original returns filed by plaintiff for tax years 1980 through 1983 employed the Act's apportionment formula in the customary manner. After these returns were accepted and fully processed by the Department, plaintiff learned of a different method which it believed would more accurately represent its Michigan business activity. Plaintiff attempted to take advantage of the relief available under § 69 by filing amended returns which incorporated a two-step apportionment/allocation method. This method includes allocation of plaintiff's actual Michigan compensation expenses, rather than estimation thereof through apportionment. In other words, plaintiff excluded compensation from its pre-apportionment adjusted tax base, contrary to § 9(5). The apportionment formula was applied to plaintiff's adjusted tax base less compensation. Then, the known amount of plaintiff's Michigan compensation expenses was added to the apportionment product to yield that portion of plaintiff's total business activity attributable to Michigan.

The Department refused to approve this alternate two-step method even though the Tax Tribunal and the Court of Appeals had previously recognized it as legitimate and appropriate under similar circumstances. See *Jones & Laughlin Steel Corp v Dep't of Treasury*, 145 Mich App 405; 377 NW2d 397 (1985), *lv den* 424 Mich 894 (1986).

In defense of its decision, the Department contends the *Jones & Laughlin* ruling is not a binding precedent. The Department presents arguments based on other authorities which were largely rejected by the *Jones & Laughlin* court. Adjudication of plaintiff's claim depends almost exclusively upon the force and effect of *Jones & Laughlin*.

The Jones & Laughlin Steel Corporation and Wilson Foods Corporation filed single business tax returns for tax years 1976, 1977 and 1978, using the above-described two-step method. The Department refused to approve the method. The Tax Tribunal overruled the Department, holding (1) that the statutory apportionment formula failed to accurately represent the taxpayers' Michigan business activity; and (2) that the alternate two-step method yielded a substantially more accurate result. *Jones & Laughlin Steel Corp v Dep't of Treasury*, MTT Docket Nos. 57892 and 57893, Opinion & Judgment dated September 5, 1984. The Court of Appeals affirmed the Tax Tribunal judgment. Thus, the Court of Appeals' *Jones & Laughlin* ruling does not establish a broad rule

of general applicability. It is merely an affirmance of the Tax Tribunal's treatment of two taxpayers under the Single Business Tax Act. Yet, while it may be inaccurate to characterize *Jones & Laughlin* as "binding precedent," to the extent the instant fact situation is materially indistinguishable from the one treated in *Jones & Laughlin*, the Court of Appeals' reasoning certainly represents persuasive authority.

Both the Tax Tribunal's and the Court of Appeals' determination that application of the statutory apportionment formula yielded inaccurate results as to Jones & Laughlin Steel and Wilson Foods rested essentially upon two findings:

> (1) that each taxpayer's actual compensation expenses attributable to Michigan was a known amount; and
>
> (2) that application of the statutory apportionment formula to each taxpayer's total compensation expenses yielded an apportioned compensation approximation more than 50% greater than each taxpayer's actual Michigan compensation expenses for each tax year.

Where these two circumstances coincided, it was determined that application of the statutory apportionment formula was unfair, justifying § 69 relief.

It appears both circumstances are present in the instant case as well. While the Department has questioned the accuracy of plaintiff's compensation figures, no documentary evidence has been submitted to refute plaintiff's verified tax returns. Therefore, under MCR 1985, 2.116

(G)(4), the Court is bound to accept as true the compensation figures reflected in plaintiff's tax returns. Further, it appears use of the apportionment formula yields approximations of Michigan compensation which range from 194% to 790% greater than actual Michigan compensation for the tax years at issue.[1] The Department has suggested no viable grounds for distinguishing the *Jones & Laughlin* case from plaintiff's case. Accordingly, the Court hereby adopts the reasoning employed by the Court of Appeals in *Jones & Laughlin* in holding that Act's three-factor apportionment formula fails to accurately represent the extent of plaintiff's Michigan business activity.

II

It follows from the foregoing conclusion that plaintiff is entitled to § 69 relief. However, an alternate method of calculating plaintiff's tax base is effective only if approved by the Department. Plaintiff sought approval of its two-step method through filing amended tax returns. The Department rejected the amended returns based apparently upon its determination that application of the Act's apportionment formula did not yield unfair results. Thus, it appears the Department never considered the appropriateness of plaintiff's alternate method. The prerequisite to the effectiveness of an alternate method, the

[1]The Court notes that even if the Act § 31(5) deduction, discussed *infra*, is accounted for, plaintiff's Michigan compensation is greatly over-estimated by application of the apportionment formula, ranging from 171% to 613% greater than actual compensation for the tax years at issue.

Department's approval, was never actually granted or denied. The Department never reached the question.

When confronted with this situation in *Jones & Laughlin*, the Tax Tribunal noted the Department had not promulgated procedural rules whereby a proposed alternate method could be evaluated. The Tax Tribunal proceeded to establish and apply its own standard. It determined that a proposed method ought to be approved if it provides a "substantially more accurate representation" of the taxpayer's Michigan business activity. The Tax Tribunal determined in *Jones & Laughlin* that the two-step method varied from the Act's apportionment formula in one respect only: its treatment of Michigan compensation expenses. Since the two-step method substituted a known actual amount for an estimated inaccurate amount, the Tax Tribunal concluded the two-step method represented the taxpayer's Michigan business activity with substantially more accuracy than the Act's apportionment formula. As to this finding, there is no genuine issue of material fact. Under the standard established in *Jones & Laughlin*, this finding alone is sufficient to dictate that the Department should have approved the two-step method. Consistent with *Jones & Laughlin*, therefore, the Court holds the Department must accept and approve plaintiff's use of the alternate two-step method.

The Court is not unmindful of the Department's objection. Indeed, the Act's apportionment formula has been recognized as the "preferred method established by the Legislature for determining the extent of a taxpayer's

business activity in Michigan." *Payne & Dolan of Wisconsin, Inc v Dep't of Treasury,* 138 Mich App 418, 424; 360 NW2d 208 (1984). Consistent with this preference, the Department denied plaintiff's request to depart therefrom. Now, based on *Jones & Laughlin,* this Court has overruled [sic] the Department's decision, has found application of the Act's apportionment formula unfair, and has found plaintiff's proposed alternate method substantially more accurate. The Department argues it should be allowed to propose and ultimately employ an alternate method which is even more accurate than plaintiff's two-step method. The Court disagrees.

The Department finds itself in what may be perceived as a disadvantageous position due to its own neglect. Under § 104 of the Act, the Department is empowered and required to promulgate rules governing the Act's implementation. It appears, however, that no rules have been promulgated to govern the procedure whereby the appropriateness of § 69 relief is evaluated. In the absence of such rules, the Tax Tribunal in *Jones & Laughlin* created a determinative standard, discussed *supra.* The standard does not provide for ascertainment of the "most accurate method." It provides simply that if a proposed alternate method is substantially more accurate than the Act's apportionment formula, it should be approved. The standard is not without its shortcomings. However, inasmuch as it represents the Tax Tribunal's reasonable attempt to administer the Act in a manner consistent with legislative intent, it is entitled to this Court's deference. Moreover, the standard has been ratified by the Court of Appeals. Under these circumstances, and considering the present

facts are materially indistinguishable from those reviewed in *Jones & Laughlin,* the Court does not deem it proper to supplant the *Jones & Laughlin* standard with the new one proferred by the Department.

III

The Department further objects to the conjunctive use of plaintiff's two-step method with the deduction permitted under § 31(5) of the Act. Section 31(5) provides that a taxpayer "may elect to reduce the adjusted tax base by the percentage that the compensation divided by the tax bse [sic] exceeds 63%." This deduction is designed to give a tax break to labor-intensive businesses. *Frankenmuth Mutual Ins Co v Dep't of Treasury,* 134 Mich App 489, 495; 350 NW2d 903 (1984). It provides for a deduction from the taxpayer's pre-apportionment adjusted tax base. *Id,* 134 Mich App 496. Compensation exempted from the pre-apportionment adjusted tax base is not included in the numerator of the § 31(5) calculation. Id, 134 Mich App 497. Since, under plaintiff's two-step method, all compensation is excluded from the pre-apportionment adjusted tax base, plaintiff is entitled to no deduction under § 31(5).

IV

Accordingly, plaintiff is entitled to summary disposition under MCR 1985, 2.116(C)(10). The Department is hereby directed to accept and process plaintiff's amended single business tax returns, disallowing any claimed § 31(5) deduction, and refunding any overpayment to which plaintiff is entitled.

Exhibit 7—MTD

IT IS SO ORDERED.

Dated: March 30, 1987

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CIRCUIT JUDGE

Exhibit 8—AMP

STATE OF MICHIGAN
COURT OF CLAIMS

AMP INCORPORATED,

Plaintiff,

Docket No. 86-10216-CM

vs.

STATE OF MICHIGAN
DEPARTMENT OF TREASURY,
REVENUE DIVISION,

Defendant.

_____/

JUDGMENT ORDER

At a session of said Court, held in the City Hall Building, Lansing, Michigan, on the 27th day of April, of 1987.

PRESENT: HONORABLE MICHAEL G. HARRISON, CIRCUIT JUDGE

This Court, having reviewed evidence presented in this proceeding relating to the request of Plaintiff for relief under Section 69 of the Michigan Single Business Tax Act, 1975 P.A. 228, MCL 208.1 *et seq*, MSA 7.558 (101) *et seq* (herein the "Act"); and

This Court having reviewed the affidavit of Stephen Horoshak, Director of Taxes for AMP Incorporated, and

This Court having also reviewed the pleadings and Plaintiff's Motion for Summary Disposition; and

This Court further finding that application of the statutory three factor apportionment formula against the

compensation component of Plaintiff's tax base excessively attributes compensation to Michigan by more than 350%, when compared with what the parties have admitted to have been Plaintiff's Michigan actual compensation for each of the years here at issue; and

This Court further finding that the alternative assignment of compensation as reflected in Plaintiff's claims will more fairly represent Plaintiff's business activity in this State for each of the years here at issue;

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. In order to more fairly represent Plaintiff's business activity in Michigan for its tax years 1980, 1981, 1982, 1983 and 1984, Plaintiff is entitled to relief under Section 69 of the Single Business Tax Act.

2. The measure of the relief to which Plaintiff is entitled is represented by methodology outlined in Plaintiff's claim; which applies the three factor apportionment formula under the Act to all components of Plaintiff's tax base except for compensation where, instead of apportionment, there is allocated to this state for each of the years here at issue Michigan actual compensation in the following amounts: 1980, $452,229; 1981, $481,862; 1982, $541,786; 1983, $595,230; 1984, $694,286.

3. As the Section 69 relief to be accorded Plaintiff by allocating compensation to the extent indicated above in paragraph 2 of this Order, Defendant shall refund to Plaintiff One Hundred Fifty-Five Thousand Eight Hundred Forty-Three and No/100 ($155,843.00) Dollars of

single business tax, in the aggregate, for all years covered by this dispute, together with interest at the applicable statutory rate.

/s/ MICHAEL G. HARRISON
MICHAEL G. HARRISON
Circuit Judge

APPROVED FOR ENTRY:

/s/ Charles E. Liken
Charles E. Liken
Assistant Attorney General

Exhibit 9—Trinova

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

TRINOVA CORPORATION, (formerly LIBBEY-OWENS-FORD COMPANY),

Plaintiff,

File No. 86-10430-CM

HON. ROBERT HOLMES BELL

-VS-

STATE OF MICHIGAN, DEPARTMENT OF TREASURY, REVENUE DIVISION,

Defendant.

OPINION AND ORDER OF THE COURT

This case presents an action by plaintiff, Trinova Corporation, to recover an alleged overpayment of taxes under the Single Business Tax Act. The Department of Treasury's answer thereto includes a counterclaim, asserting plaintiff actually owes additional tax for tax year 1980. Both parties have moved for summary disposition under MCR 2.116(C)(9), asserting their opponent has failed to state a valid defense.[1]

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[1]Normally, a motion for summary disposition under MCR 2.116(C)(9) is based exclusively on the pleadings. Here, however, both parties have asked the Court to also consider a document entitled "Stipulated Facts" in evaluating their motions. Pursuant to this mutual request, this document is herein treated as a pleading in which speaks on behalf of both parties as to both claims before the Court.

Exhibit 9—Trinova

Plaintiff is an Ohio corporation which conducts business in Michigan. For the privilege of doing business in Michigan during tax year 1980, plaintiff paid tax under the Single Business Tax Act ("Act"), MCL 208.1 *et seq.*; MSA 7.558(1) *et seq.* Plaintiff's tax liability for 1980 was computed through application of the Act's § 45 formula. Plaintiff paid this amount, $293,528, in full. In 1985, plaintiff filed an amended single business tax return, requesting the Department of Treasury ("Department") to re-calculate its 1980 tax liability by an alternate method. When the request was denied, plaintiff filed the instant complaint, asking the Court to rule that plaintiff is entitled to use the alternate method and to award a total tax refund of $293,528. In its counterclaim, the Department, too, asserts plaintiff's 1980 single business tax liability ought to have been calculated by an alternate method. According to its proposed method, plaintiff owes additional tax in the amount of $576,804.

I

The Act imposes a specific tax on the adjusted tax base of every person who conducts business in Michigan. The "adjusted tax base" is essentially federal taxable income, subject to certain additions and subtractions enumerated at § 9 of the Act. One of these "adjustments," at § 9(5), requires the taxpayer to add compensation paid its employees to its tax base. Similarly, § 9(4)(e) requires the taxpayer to add to its tax base any tangible assets depreciation deductions which had been subtracted in arriving at federal taxable income. Thus, compensation ex-

penses and an amount equal to depreciation deductions previously taken become part of the adjusted tax base. In order to determine what portion of the adjusted tax base of a corporation like plaintiff, which conducts business within and without Michigan, is taxable as Michigan business activity, a three-factor apportionment formula is applied. Section 45 of the Act provides:

> All of the tax base, other than the tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3.

Application of this apportionment formula is designed to produce a reasonable *approximation* of that share of a multi-state taxpayer's business activity which is attributable to Michigan. Because the resultant approximation may be more or less accurate, depending on taxpayer-specific circumstances, relief from the apportionment formula is sometimes available under § 69 of the Act:

> (1) If the apportionment provisions of this act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the commission [sic] may require, in respect to all of any part of the taxpayer's business activity, if reasonable:
>
> (a) Separate accounting.
>
> (b) The exclusion of any 1 or more of the factors.

> (c) The inclusion of 1 or more additional factors which will fairly represent the taxpayer's business activity in this state.
>
> (d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's tax base.
>
> (2) An alternate method will be effective only if it is approved by the commissioner.

Plaintiff attempted to take advantage of this § 69 relief by filing an amended return which incorporated a two-step apportionment/allocation method. This method includes allocation of actual Michigan compensation expenses and actual Michigan depreciation amounts, rather than estimation thereof through apportionment. In other words, plaintiff excluded compensation and depreciation amounts from its preapportionment adjusted tax base, contrary to § 9. The apportionment formula was applied to plaintiff's adjusted tax base less compensation and depreciation. Then, the known amounts of plaintiff's Michigan compensation and depreciation were added to the apportionment product to yield that portion of plaintiff's total business activity attributable to Michigan. The Department refused to approve this alternate two-step method even though the Tax Tribunal and the Court of Appeals had previously recognized it as legitimate and appropriate under similar circumstances. See *Jones & Laughlin Steel Corp v Dep't of Treasury*, 145 Mich App 405; 377 NW2d 397 (1985), *lv den* 424 Mich 894 (1986).

In defense of its decision, the Department contends the *Jones & Laughlin* ruling is not a binding precedent.

The Department presents arguments based on other authorities which were largely rejected by the *Jones & Laughlin* court. Adjudication of plaintiff's claim depends almost exclusively upon the force and effect of *Jones & Laughlin.*

The Jones & Laughlin Steel Corporation and Wilson Foods Corporation filed single business tax returns for tax years 1976, 1977 and 1978, using the above-described two-step method. The Department refused to approve the method. The Tax Tribunal overruled the Department, holding (1) that the statutory apportionment formula failed to accurately represent the taxpayers' Michigan business activity; and (2) that the alternate two-step method yielded a substantially more accurate result. *Jones & Laughlin Steel Corp v Dep't of Treasury*, MTT Docket Nos. 57892 and 57893, Opinion & Judgment dated September 5, 1984. The Court of Appeals affirmed the Tax Tribunal judgment. Thus, the Court of Appeals' *Jones & Laughlin* ruling does not establish a broad rule of general applicability. It is merely an affirmance of the Tax Tribunal's treatment of two taxpayers under the Single Business Tax Act. Yet, while it may be inaccurate to characterize *Jones & Laughlin* as "binding precedent," to the extent the instant fact situation is materially indistinguishable from the one treated in *Jones & Laughlin*, the Court of Appeals' reasoning certainly represents persuasive authority.

Both the Tax Tribunal's and the Court of Appeals' determination that application of the statutory apportionment formula yielded inaccurate results as to Jones &

Laughlin Steel and Wilson Foods rested essentially upon two findings:

> (1) that each taxpayer's actual compensation expenses attributable to Michigan was a known amount; and
>
> (2) that application of the statutory apportionment formula to each taxpayer's total compensation expenses yielded an apportioned compensation approximation more than 50% greater than each taxpayer's actual Michigan compensation expenses for each tax year.

Where these two circumstances coincided, it was determined that application of the statutory apportionment formula was unfair, justifying § 69 relief.

Based on the pleadings, it appears both circumstances are present in the instant case as well, as to both compensation and depreciation. Plaintiff's 1980 apportioned Michigan compensation is approximately 40 times greater than actual compensation ($20,308,006 vs $511,774), while apportioned Michigan depreciation is approximately 1000 times greater than actual depreciation ($2,087,078 vs $2,152).

The Department has suggested no viable grounds for distinguishing *Jones & Laughlin* from plaintiff's case. Instead, the Department argues simply the *Jones & Laughlin* reasoning is defective and should be ignored. Contrary to *Jones & Laughlin*, the Department maintains it is not enough to show that one or even two elements of a taxpayer's business activity are over-estimated by application of the Act's formula. Rather, the Department argues, the

Act's formula should be departed from only if its application results in unfairly high or unfairly low taxation.

The *Jones & Laughlin* court addressed this argument directly as follows:

> The inquiry does not turn on the end result, i.e., tax liability. Rather, it turns on whether the basis for computing tax liability is fair, i.e., is the business activity subject to taxation accurately reflected by application of the three factor formula? 145 Mich App 412.

The Court of Appeals went on to hold that where even just one element of business activity is shown, by clear and convincing evidence, to be inaccurately represented by application of the apportionment formula, § 69 relief is available.

Whether this Court agrees entirely with this ruling is immaterial. It is this Court's function to interpret and apply the Single Business Tax Act in accordance with legislative intent and the pronouncements of the state's higher courts. Accordingly, the Court believes the Court of Appeals' *Jones & McLaughlin* decision is entitled to more respect than the Department is willing to acknowledge. The Court hereby adopts the reasoning employed therein and holds as a matter of law based on the pleadings that the Act's apportionment formula fails to accurately represent plaintiff's Michigan business activity.

II

It follows that plaintiff is entitled to § 69 relief. However, an alternate method of calculating plaintiff's tax base is effective only if approved by the Department. It

appears the Department never passed upon the appropriateness of plaintiff's proposed alternate two-step method because it believed the Act's formula was suitable. When confronted with this situation in *Jones & Laughlin*, the Tax Tribunal noted the Department had not promulgated procedural rules whereby a proposed alternate method could be evaluated. The Tax Tribunal proceeded to establish and apply its own standard. It determined that a proposed method ought to be approved if it provides a "substantially more accurate representation" of the taxpayer's Michigan business activity. The Tax Tribunal determined in *Jones & Laughlin* that the two-step method varied from the Act's apportionment formula in one respect only: its treatment of Michigan's compensation expenses. Since the two-step method substituted a known actual amount for an estimated inaccurate amount, the Tax Tribunal concluded the two-step method represented the taxpayer's Michigan business activity with substantially more accuracy than the Act's apportionment formula. Thus, the taxpayers were permitted to use the two-step method over the Department's objection. The Court of Appeals affirmed this result.

Here, the pleadings suggest similar treatment is justified. Applying the standard established in *Jones & Laughlin*, it is clear the Department should have approved plaintiff's proposed two-step method. It represents plaintiff's Michigan compensation and depreciation with substantially more accuracy than the Act's apportionment formula and does not further distort any other element of plaintiff's business activity. The Department has not

disputed this fact, but objects to the resultant reduction in plaintiff's tax liability. Consistent with the Court of Appeals' rejection of this argument, the Court concludes the Department has failed to state a valid defense. Plaintiff's unrefuted allegation that the two-step method represents two elements of its business activity with substantially more accuracy than the apportionment formula justifies summary declaration in plaintiff's favor. Whether plaintiff is entitled to refund or tax paid, however, is a question which depends in part upon resolution of the Department's counterclaim.

Although the Department, in defending against plaintiff's claim, contends the Act's formula does fairly represent plaintiff's 1980 Michigan business activity, its counterclaim asserts the contrary position. The Department alleges therein that application of the Act's formula fails to fairly represent (1) "the extent of Plaintiff's use of the State of Michigan as a market for its products;" and (2) "the significant amount of receipts which Plaintiff derives from its business activities in Michigan." The Department proposes an alternate method based solely upon plaintiff's Michigan sales. This method, too, is said to represent plaintiff's Michigan business activity substantially more accurately than the Act's apportionment formula. Asserting plaintiff has stated no valid defense to the claim, the Department moves for summary disposition in its favor.

Plaintiff admits its actual 1980 Michigan "sales," (gross receipts obtained in consideration for transfer of inventory to customers in the ordinary course of business and for performance of services), amounted to

$103,981,354. Using the Act's formula, Michigan sales were estimated to be only $35,196,000. While admitting this circumstance may justify departure from the Act's formula, plaintiff contends the Department's proposed alternate method is not substantially more accurate. In fact, both parties acknowledge that use of the Department's proposed one-factor formula results in even more extreme exaggerations of plaintiff's Michigan compensation and depreciation than use of the Act's formula. (Stipulated Facts, pp 6, 7.) The very evil which the Tax Tribunal and Court of Appeals sought to avoid in *Jones & Laughlin*, taxation of extra-territorial business activity, is thus compounded by use of the Department's proposed formula. This cannot be permitted. The Court must conclude the Department's proposed one-factor method does not represent plaintiff's business activity with substantially more accuracy than the Act's apportionment formula.

It must be remembered that the Act's apportionment formula has been recognized as the "preferred method established by the Legislature for determining the extent of a taxpayer's business activity in Michigan." *Payne & Dolan of Wisconsin, Inc v Dep't of Treasury*, 138 Mich App 418, 424; 360 NW2d 208 (1984). The two-step method proposed by plaintiff, *supra*, pays deference to this preference by departing therefrom minimally. It applies the Act's apportionment formula to all elements of plaintiff's tax base except compensation and depreciation. It further ensures that plaintiff's compensation and depreciation are even more accurately represented by allocating the actual amounts. While plaintiff's two-step method does not cor-

rect the under-estimation of plaintiff's Michigan sales caused by use of the Act's formula, neither does it compound the distortion. Plaintiff's method does not represent its business activity with perfect exactitude, but it is superior to the Act's formula.

On the other hand, the Department's proposed alternate method represents a profound departure from the Act's formula. It replaces the legislatively preferred three-factor formula with a one-factor (sales) formula, eliminating the payroll and property factors from the equation. Not only does it appear to attach inordinate importance to plaintiff's sales, but it greatly distorts plaintiff's compensation and depreciation expenses. It is anything but an improvement upon the Act's formula.

The Court finds that plaintiff has stated a valid defense to the counterclaim. The Department's motion for summary disposition must be denied. Furthermore, the pleadings compel the conclusion that, as to the Department's counterclaim, there is no genuine issue of material fact. As a matter of law, the Court holds the Department's proposed alternate method is not substantially more accurate than the Act's formula. The Department is not entitled under § 69 of the Act to employ its proposed one-factor formula in determining plaintiff's single business tax. Plaintiff is entitled to summary disposition under MCR 2.116(I)(1).

Based on the premises, the Department's counterclaim is hereby dismissed. Further, plaintiff is awarded summary disposition as to its claim under MCR 2.116(C)(9). The Department is hereby directed to accept and process

plaintiff's amended single business tax returns for tax year 1980, refunding any overpayment and interest to which plaintiff is entitled.

IT IS SO ORDERED.

Dated: May 5, 1987

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CIRCUIT JUDGE sitting in
the Court of Claims

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PENTON/INDUSTRIAL
PUBLISHING CO., INC.,

Plaintiff,

-VS-

STATE OF MICHIGAN,
DEPARTMENT OF TREASURY,
REVENUE DIVISION,

Defendant.

File 86-10231-CM

HON. ROBERT
HOLMES BELL

OPINION AND ORDER OF THE COURT

This is an action under MCL 208.88; MSA 7.558(88) to recover taxes paid by plaintiff. Now before the Court are cross-motions for summary disposition based upon the pleadings.

Plaintiff, Penton/Industrial Publishing Co., Inc., is a Delaware Corporation whose principal office is in Cleveland, Ohio. Plaintiff conducts business in Michigan, operating an advertising sales office and employing eight persons. For the privilege of doing business in Michigan during tax years 1980, 1981, 1982 and 1983, plaintiff paid tax under the Single Business Tax Act ("Act"), MCL 208.1 *et seq.*; MSA 7.558(1) *et seq.* Plaintiff's tax liability for each year was computed through application of the

Act's § 45 apportionment formula. Plaintiff's requests to use an alternate formula which would have yielded a smaller tax liability for each year, have been denied by the Department of Treasury ("Department"). The Court is asked to rule that plaintiff is entitled to use the alternate formula and to award a total tax refund of $28,275.

I

The Single Business Tax Act imposes a specific tax on the adjusted tax base of every person who conducts business in Michigan. The "adjusted tax base" is essentially federal taxable income, subject to certain additions and subtractions enumerated at § 9 of the Act. One of these "adjustments," at § 9 (5), requires the taxpayer to add compensation paid its employees to its taxable income. Thus, compensation becomes a part of the adjusted tax base. In order to determine what portion of the adjusted tax base of a corporation like plaintiff, which conducts business within and without Michigan, is taxable as Michigan business activity, a three-factor apportionment formula is applied. Section 45 of the Act provides:

> All of the tax base, other than the tax base derived principally from transportation, financial or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3.

Application of this apportionment formula is designed to produce a reasonable *approximation* of that share of a multistate taxpayer's business activity which is attribut-

able to Michigan. Because the resultant approximation may be more or less accurate, depending on taxpayer-specific circumstances, relief from the apportionment formula is sometimes available under § 69 of the Act:

> (1) If the apportionment provisions of this act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the commission [sic] may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
>
> (a) Separate accounting.
>
> (b) The exclusion of any 1 or more of the factors.
>
> (c) The inclusion of 1 or more additional factors which will fairly represent the taxpayer's business activity in this state.
>
> (d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's tax base.
>
> (2) An alternate method will be effective only if it is approved by the commissioner.

Plaintiff attempted to take advantage of the relief available under § 69 by filing returns which incorporated a two-step apportionment/allocation method. This method includes allocation of plaintiff's actual Michigan compensation expenses, rather than estimation thereof through apportionment. In other words, plaintiff excluded compensation from its pre-apportionment adjusted tax base, contrary to § 9(5). The apportionment formula was applied to plaintiff's adjusted tax base less compensation. Then, the known amount of plaintiff's Michigan compensation expenses was added to the apportionment product

to yield that portion of plaintiff's total business activity attributable to Michigan. The Department refused to approve this alternate two-step method even though the Tax Tribunal and the Court of Appeals had previously recognized it as legitimate and appropriate under similar circumstances. See *Jones & Laughlin Steel Corp v Dep't of Treasury*, 145 Mich App 405; 377 NW2d 397 (1985), *lv den* 424 Mich 894 (1986).

In defense of its decision, the Department contends the *Jones & Laughlin* ruling is not a binding precedent. The Department presents arguments based on other authorities which were largely rejected by the *Jones & Laughlin* court. Adjudication of plaintiff's claim depends almost exclusively upon the force and effect of *Jones & Laughlin*.

The Jones & Laughlin Steel Corporation and Wilson Foods Corporation filed single business tax returns for tax years 1976, 1977 and 1978, using the above-described two-step method. The Department refused to approve the method. The Tax Tribunal overruled the Department, holding (1) that the statutory apportionment formula failed to accurately represent the taxpayer's Michigan business activity; and (2) that the alternate two-step method. The Tax Tribunal overruled the Department, *Jones & Laughlin Steel Corp v Dep't of Treasury*, MTT Docket Nos. 57892 and 57893, Opinion & Judgment dated September 5, 1984. The Court of Appeals affirmed the Tax Tribunal judgment. Thus, the Court of Appeals' *Jones & Laughlin* ruling does not establish a broad rule of general applicability. It is merely an affirmance of the Tax Tribunal's treatment of two taxpayers under the Single Business Tax Act. Yet, while it may be inaccurate

to characterize *Jones & Laughlin* as "binding precedent," to the extent the instant fact situation is materially indistinguishable from the one treated in *Jones & Laughlin*, the Court of Appeals' reasoning certainly represents persuasive authority.

Both the Tax Tribunal's and the Court of Appeals' determination that application of the statutory apportionment formula yielded inaccurate results as to Jones & Laughlin Steel and Wilson Foods rested essentially upon two findings:

> (1) that each taxpayer's actual compensation expenses attributable to Michigan was a known amount; and
>
> (2) that application of the statutory apportionment formula to each taxpayer's total compensation expenses yielded an apportioned compensation approximation more than 50% greater than each taxpayer's actual Michigan compensation expenses for each tax year.

Where these two circumstances coincided, it was determined that application of the statutory apportionment formula was unfair, justifying § 69 relief.

Plaintiff has alleged both circumstances are present in the instant case as well, asserting its apportioned Michigan compensation is more than 100% greater than actual Michigan compensation for each tax year at issue. The Department, in its answer, has admitted these allegations, but maintains they are inconsequential. Unable to distinguish the present facts from those treated in *Jones & Laughlin*, the Department argues simply the *Jones & Laughlin* reasoning is defective and should be ignored.

Contrary to *Jones & Laughlin*, the Department maintains it is not enough to show that one element of a taxpayer's business activity is over-estimated by application of the Act's formula. Rather, the Department argues, the Act's formula should be departed from only if its application results in unfairly high or unfairly low taxation.

The *Jones & Laughlin* court addressed this argument directly, as follows:

> The inquiry does not turn on the end result, i.e., tax liability. Rather, it turns on whether the basis for computing tax liability is fair, i.e., is the business activity subject to taxation accurately reflected by application of the three-factor formula? 145 Mich App 412.

The Court of Appeals went on to hold that where even just one element of business activity is shown, by clear and convincing evidence, to be inaccurately represented by application of the apportionment formula, § 69 relief is available.

Whether this Court agrees entirely with this ruling is immaterial. It is this Court's function to interpret and apply the Single Business Tax Act in accordance with legislative intent and the pronouncements of the state's higher courts. Accordingly, the Court believes the Court of Appeals' *Jones & Laughlin* decision is entitled to more respect than the Department is willing to acknowledge. The Court hereby adopts the reasoning employed therein and holds the Act's three-factor apportionment formula fails to accurately represent the extent of plaintiff's Michigan business activity.

II

It follows that plaintiff is entitled to § 69 relief. However, an alternate method of calculating plaintiff's tax base is effective only if approved by the Department. It appears the Department never passed upon the appropriateness of plaintiff's proposed alternate two-step method because it believed the Act's formula was suitable. When confronted with this situation in *Jones & Laughlin*, the Tax Tribunal noted the Department had not promulgated procedural rules whereby a proposed alternate method could be evaluated. The Tax Tribunal proceeded to establish and apply its own standard. It determined that a proposed method ought to be approved if it provides a "substantially more accurate representation" of the taxpayer's Michigan business activity. The Tax Tribunal determined in *Jones & Laughlin* that the two-step method varied from the Act's apportionment formula in one respect only: its treatment of Michigan compensation expenses. Since the two-step method substituted a known actual amount for an estimated inaccurate amount, the Tax Tribunal concluded the two-step method represented the taxpayer's Michigan business activity with substantially more accuracy than the Act's apportionment formula. Thus, the taxpayers were permitted to employ the two-step method over the Department's objection. The Court of Appeals affirmed this result.

Here, plaintiff's unrefuted allegations justify similar treatment. Applying the standard established in *Jones & Laughlin*, it is clear the Department should have approved the two-step method. It represents plaintiff's Michigan

compensation expenses with substantially more accuracy than the Act's apportionment formula. The Department has failed to state a valid defense to the claim.[1] Consistent with *Jones & Laughlin*, therefore, the Court holds the Department must accept and approve plaintiff's use of the alternate two-step method.

The Department's objection to this result is understandable. Indeed, the Act's apportionment formula has been recognized as the "preferred method established by the Legislature for determining the extent of a taxpayer's business activity in Michigan." *Payne & Dolan of Wisconsin, Inc v Dep't of Treasury*, 138 Mich App 418, 424; 360 NW2d 208 (1984). Consistent with this preference, the Department denied plaintiff's requests to depart therefrom. Now, based on *Jones & Laughlin* and the pleadings here presented, the Court has concluded as a matter of law (1) that application of the Act's formula is unfair, (2) that plaintiff's proposed alternate method is substantially more accurate, and (3) that the Department must approve plaintiff's use of the alternate method. The Department argues that even if these first two conclusions are assumed to be true, they do not compel the third conclusion. Rather, the Department contends, the first two

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[1] In paragraph 3 of its answer, the Department raised the statute of limitations as a bar to plaintiff's claim for refund of its alleged 1980 tax overpayment. Inasmuch as this defense has not been incorporated as an affirmative defense under a separate and distinct heading in the answer, as required by MCR 2.111(3), and has not been advanced in support of the Department's motion for summary disposition, it is deemed waived.

conclusions merely open the door to an inquiry as to which of potentially several alternate methods would *best* represent the taxpayer's Michigan business activity. This inquiry is said to raise a question of fact which precludes summary disposition based on the pleadings. The Court disagrees.

The Department finds itself in what may be perceived as a disadvantageous position due to its own neglect. Under 104 of the Act, the Department is empowered and required to promulgate rules governing the Act's implementation. It appears, however, that no rules have been promulgated to govern the procedure whereby the appropriateness of § 69 relief is evaluated. In the absence of such rules, the Tax Tribunal in *Jones & Laughlin* created a determinative standard, discussed *supra*. The standard does not provide for ascertainment of the "most accurate method." It provides simply that if a proposed alternate method is substantially more accurate than the Act's apportionment formula, it should be approved. The standard is not without its shortcomings. However, inasmuch as it represents the Tax Tribunal's reasonable attempt to administer the Act in a manner consistent with legislative intent, it is entitled to this Court's deference. Moreover, the standard has been ratified by the Court of Appeals. Under these circumstances, and considering the facts here alleged are materially indistinguishable from those reviewed in *Jones & Laughlin*, the Court does not deem it proper to supplant the *Jones & Laughlin* standard with the new one proffered by the Department.

III

Accordingly, the Court holds as follows: (1) the Department's motion for summary disposition under MCR 2.116(C)(8) is denied; (2) plaintiff's motion for summary disposition under MCR 2.116(C)(9) is granted;[2] and (3) the Department shall accept and process plaintiff's single business tax returns for tax years 1980, 1981, 1982 and 1983; employing the alternate two-step method, and refunding any overpayment and interest to which plaintiff is entitled.

IT IS SO ORDERED.

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CIRCUIT JUDGE sitting in
the Court of Claim

Dated: May 22, 1987

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[2]This holding renders the Department's pending motion to compel answers to interrogatories moot. The motion is denied without further consideration.

STATE OF MICHIGAN

84th LEGISLATURE

REGULAR SESSION OF 1987

Introduced by Reps. Jondahl, Bryant, Berman, Smith, Brown, Weeks, Hickner, Hunter, Murphy, Browne, Trim and Van Singel

ENROLLED HOUSE BILL NO. 4398

AN ACT to amend section 69 of Act No. 228 of the Public Acts of 1975, entitled "An act to provide for the imposition, levy, computation, collection, assessment and enforcement, by lien or otherwise, of taxes on certain commercial, business, and financial activities; to prescribe the manner and times of making certain reports and paying taxes; to prescribe the powers and duties of public officers and state departments; to permit the inspection of records of taxpayers; to provide for interest and penalties on unpaid taxes; to provide exemptions, credits, and refunds; to provide penalties; to provide for the disposition of funds; to provide for the interrelation of this act with other acts; and to provide an appropriation," being section 208.69 of the Michigan Compiled Laws.

The People of the State of Michigan enact:

Section 1. Section 69 of Act No. 228 of the Public Acts of 1975, being section 208.69 of the Michigan Compiled Laws, is amended to read as follows:

Sec. 69.(1) If the apportionment provisions of this act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition

for or the commissioner may require the following, in respect to all or a part of the taxpayer's business activity, if reasonable:

(a) Separate accounting.

(b) The exclusion of 1 or more of the factors.

(c) The inclusion of 1 or more additional factors which will fairly represent the taxpayer's business activity in this state.

(d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's tax base.

(2) An alternate method will be effective only if it is approved by the commissioner.

(3) The apportionment provisions of this act shall fairly represent the business activity attributed to the taxpayer in this state, taken as a whole and without a separate examination of the specific elements of the tax base such as depreciation, compensation, or income, unless it can be demonstrated that the business activity attributed to the taxpayer in this state is out of all appropriate proportion to the actual business transacted in this state and leads to a grossly distorted result. A taxpayer's business activity shall be presumed to be fairly represented if the adjusted tax base computed without regard to the reduction based upon gross receipts permitted by section 31(2) is not greater than the adjusted tax base computed after application of the reduction based upon gross receipts permitted by section 31(2) or if the adjusted tax base is not

greater than the adjusted tax base which would result from an apportioned tax base computed by using the apportionment formula prescribed for a corporate income tax or franchise tax in the taxpayer's business domicile. The taxpayer's business domicile is the state in which the sum of the taxpayer's payroll factor and property factor is greatest. However, if the taxpayer fails to satisfy either of these tests, the taxpayer's business activity shall not be presumed to not be fairly represented.

(4) The filing of a return or an amended return shall not be considered a petition for the purposes of subsection (1).

(5) As used in this section, "adjusted tax base" means that term as defined in section 31.

Section 2. This amendatory act is curative, expressing the original intent of the legislature that the single business tax imposed under the single business tax act, Act No. 228 of the Public Acts of 1975, being sections 208.1 to 208.145 of the Michigan Compiled Laws, is an indivisible value added type of tax and not a combination or series of several smaller taxes and that relief from formulary apportionment should be granted only under extraordinary circumstances. This amendatory act clarifies the existing procedures and standards for granting relief under section 69 of the single business act, Act No. 228 of the Public Acts of 1975, being section 208.69 of the Michigan Compiled Laws.

This act is ordered to take immediate effect.

/s/ David H. Evans
Clerk of the House of Representatives.

/s/ Illegible
Secretary of the Senate.

Approved .....

.....

Governor.

STATE OF MICHIGAN
COURT OF CLAIMS

CONSOLIDATION COAL COMPANY,

Plaintiff, Docket No. 82-8407
HON. THOMAS L. BROWN

v

REVENUE DIVISION,
DEPARTMENT OF TREASURY,
STATE OF MICHIGAN,

Defendant.

Patrick R. Van Tiflin (P26119)
Attorney for Plaintiff
Foster,Swift, Collins & Coey, P.C.
313 South Washington Square
Lansing, Michigan 48933

Curtis G. Beck (P10600)
Assistant Attorney General
Attorney for Defendant

ORDER AND JUDGMENT

At a session of said Court held in the Circuit Courtrooms in City Hall in the city of Lansing, county of Ingham, state of Michigan, on the 27th day of Aug., 1987.

PRESENT: Honorable Thomas L. Brown, presiding.

This matter having come on for hearing on August 21, 1987 on Plaintiff's Motion for Summary Disposition, and the Court having reviewed the Stipulation of Facts and Plaintiff's Motion, Brief and Affidavit in support of

said Motion, and the Court having heard oral argument thereon and being otherwise duly advised in the premises; NOW THEREFORE IT IS

ORDERED, that Plaintiff's Motion for Summary Disposition is granted for the reason that, pursuant to MCR 2.116(C)(9), the Defendant has failed to state a valid defense to the claim asserted against it by the Plaintiff, the Court finding that Defendant's asserted defense of 1987 Public Act 39 is not applicable to Plaintiff's claim for refund herein, and further, pursuant to MCR 2.116(C)(10) for the reason that the result in this case is governed by § 69 of the Single Business Tax Act as originally enacted and as interpreted and applied by the Michigan Court of Appeals in *Jones & Laughlin Steel Corporation v Michigan Department of Treasury*, 145 Mich App 405, 377 NW2d 397 (1985), *lv den* 424 Mich 895 (1986), *mot for reconsid den* 424 Mich 895 (1986) and there is no genuine issue as to any material fact and the Plaintiff is entitled to judgment as a matter of law in the amount of $1,427,532.00 together with interest thereon calculated in accordance with MCLA 205.30.

/s/ Thomas L. Brown
Honorable Thomas L. Brown
Court of Claims Judge

Approved as to form:

/s/ Curtis G. Beck
Curtis G. Beck (P10060)
Attorney for Defendant
Entered on this 27 day of August, 1987.

/s/ Donna Willett
Ingham County Circuit Court Clerk

Exhibit 13—Digital

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

DIGITAL EQUIPMENT CORPORATION,

Plaintiff,

v

STATE OF MICHIGAN,
DEPARTMENT OF TREASURY,
REVENUE DIVISION,

Defendant.

OPINION AND ORDER

File No. 86-10484-CM

Hon. James T. Kallman

This Court, having heard oral arguments of counsel, having reviewed the file and being fully advised in the premises, makes the following determinations:

This matter is before the Court of defendant's motion for summary disposition. The motion is brought pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief may be granted.

Plaintiff filed this claim for a tax refund under the Single Business Tax Act as interpreted by *Jones v MDOT* 145 Mich pp [sic] 405 (1985) lv den 424 Mich 895 (1986) reconsideration den 424 Mich 895 (1986). Defendant claims 1987 PA 39 effective June 9, 1987 applies to plaintiff's claims. This court does not agree. This Court finds that 1987 PA 39 is not applicable to plaintiff's claim for a refund for the reasons stated by the defendant. Judge Brown has already made a similar ruling in *Consolidated Coal v MDOT* 82-8407-CM, order dated August 27, 1987.

Exhibit 13—Digital

It is ORDERED, ADJUDGED AND DECREED that defendant's motion for summary disposition is hereby denied.

DATED: November 2, 1987

/s/ James T. Kallman
James T. Kallman
Court of Claims Judge

Exhibit 14—First Wisconsin

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

FIRST WISCONSIN FINANCIAL CORPORATION,

Plaintiff, Docket No. 87-11132-CM

v. HON. CAROLYN STELL

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Defendant.

Patrick R. Van Tiflin (P26119)
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ORDER AND JUDGMENT

At a session of said Court, held in the Circuit Courtrooms in Town Center, Lansing, Michigan, on the 25th day of November, 1987.

PRESENT: HONORABLE CAROLYN STELL, Circuit Judge, Presiding

This matter having come on for hearing before this Court on Wednesday, October 21, 1987, on Plaintiff's Motion for Summary Disposition of its Complaint for Refund of Single Business Tax, and the Court having reviewed the pleadings filed by the respective parties in support of and in opposition to Plaintiff's Motion, and the Court having conducted a hearing and heard the oral argument of counsel for the parties, and being otherwise duly advised in the premises, and the Court finding as follows:

Exhibit 14—First Wisconsin

Defendant basically admits the factual paragraphs of Plaintiff's motion. The Defendant's response is that first, *Jones and Laughlin* is clearly not a correct interpretation of the original legislative intent and, two, that the use of the statutory three-factor formula does result in a fair reflection of Plaintiff's Michigan business activity.

With respect to the first argument, *Jones & Laughlin* may not be a correct interpretation, but it is the interpretation of the Michigan Court of Appeals which has been allowed to stand by the Michigan Supreme Court's refusal to hear the case. Therefore, it is the law that this Court must follow. *Jones and Laughlin* says that the proper test for invoking Section 69 is whether the taxpayer's Michigan tax base as derived from the application of the three-factor apportionment formula to its adjusted tax base accurately reflects the extent of the taxpayer's business activity within the state.

Defendant cites 1987 P.A. 39 which offers an expression of the original intent of the Legislature. P.A. 39 provides that specific elements such as income should not be separately examined unless it can be demonstrated that the business activity attributed to the taxpayer in the

state is out of all proportion to the actual business transacted in the state and leads to a grossly distorted result. Plaintiff responds by arguing that Defendant has not pled this as an affirmative defense and therefore is untimely. The scheduling conference order was signed on August 31st, 1987 by this Court, and it set September 30th, 1987, as a deadline for amending pleadings. I would note that in fact, as is set forth in the scheduling conference order, that because of my experience with these two counsel and because we've had many of these cases together, counsel themselves met and established these deadlines which were acceptable to the Court. So this is not some kind of artificial deadline imposed upon counsel by the Court, and counsel met to do so on August 26, 1987. This statute had been signed on June 9th, 1987. Therefore, counsel were aware at the time they met of the availability of this defense.

The Court holds that it is untimely and would not consider it for that reason. However, ruling in the alternative so that, in the end, if a reviewing court should find it was not untimely and that the Court is wrong in denying Defendant's oral motion to amend, I am going to consider it under several other theories. First, it appears to me that the Amendment presents two significant constitutional problems. The first is the issue of retroactivity and the situation is such that, as Plaintiff's counsel has pointed out, the law was not really in a state of flux. It was in a state of the Department of Treasury disagreeing very strenuously with an appellate court decision. But it was not the kind of situation in which retroactivity normally is granted on the theory that everybody knew everything was up in the air and therefore they should have been prepared for whatever result came down.

Secondly, I think that it presents constitutional problems under the commerce clause as detailed by Plaintiff's counsel. So, I would disregard it because of those constitutional problems. However, in the alternative, should a reviewing court find there are no constitutional problems either with the application of it retroactively or with the impact this has on the US Commerce Clause, I would make findings on a factual basis, and I would note that when a motion is made under MCR 2.116(C)(10), that an affidavit or supporting documentary evidence is required. That requirement was met by Plaintiff, both by affidavit and by citing to specific paragraphs in the Plaintiff's First Request for Admissions. MCR 2.116(G)(4) requires that the opposing party cannot simply deny, but must respond either by affidavit or other means set forth in the rule, and in the event of a failure to do so, that judgment shall be granted in favor of the moving party if it is appropriate. Here, in looking at the facts, Plaintiff is a Wisconsin business corporation with its principal office in Milwaukee. Its business activity in Michigan consists of the issuance of loans to Michigan borrowers through Plaintiff's Milwaukee office. Plaintiff had no Michigan employees. For the years in question, Defendant calculated compensation paid by the Plaintiff and included it in the tax base. This ranged from $629,103 to $2,172,699, and represented as a percentage of the tax base between 23 and 166 percent.

Exhibit 14—First Wisconsin

Defendant also calculated Section 65 apportionment formula factors for the Plaintiff in a range from .083806 to .192319, resulting in a tax base apportioned to Michigan ranging from $188,870 to $1,071,137. The apportioned compensation ranged from $52,730 to $400,238, while the actual compensation for each of the challenged years was zero. It is easy to observe that the apportioned compensation grossly exceeded the actual compensation.

The Court finds that the totality of these circumstances results in a grossly distorted result even under P.A. 39 and therefore summary disposition is appropriate.

Defendant also raises a statute of limitations defense with respect to tax years 1977 through 1980. Plaintiff argues the statute was tolled by a waiver of the federal statute of limitations on Plaintiff's federal income tax return for these years, citing MCL 208.97. The parties disagree as to the interpretation of § 85 of the Single Business Tax Act. Without going through all of this again on my own, the Court simply adopts the reasoning of Judge Harrison in *Armco, Inc. v State of Michigan*, Docket No. 84-9612 in the Court of Claims and rejects Defendant's position.

NOW, THEREFORE, IT IS ORDERED that Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(8) is granted for the reason that Defendant has failed to state a valid defense to Plaintiff's Complaint and also pursuant to MCR 2.116(C)(10), for the reason that there is no genuine issue as to any material fact and Plaintiff is entitled to judgment as a matter of law, and

Exhibit 14—First Wisconsin

Plaintiff is entitled to judgment against the Defendant herein in the amount of $40,110, together with interest calculated in accordance with MCLA 208.97(3) and MCLA 205.30(3).

/s/ Carolyn Stell
Honorable Carolyn Stell, Circuit Judge and Judge of the Court of Claims

Approved as to form:

/s/ Curtis G. Beck
Curtis G. Beck (P10600)
Attorney for Defendant
Entered on this — day of November, 1987.

.....
Clerk of the Court of Claims

Exhibit 15—Magic Chef

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

MAGIC CHEF, INC.

Plaintiff, Docket No. 86-10395-CM

v. HON. JAMES R. GIDDINGS

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Defendant.

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Attorney for Defendant
First Floor, Treasury Building
Lansing, MI 48913
517/373-1142

ORDER AND JUDGMENT

At a session of said Court, held in the Circuit Courtrooms in City Hall, Lansing, Michigan, on the 15th day of December, 1987.

Exhibit 15—Magic Chef

PRESENT: HONORABLE JAMES R. GIDDINGS,
Circuit Judge, Presiding

This matter having come on for hearing on November 10, 1987 on Plaintiff's Motion for Summary Disposition of its Complaint For Refund of Single Business Taxes, based upon MCR 2.116(C)(9) on the ground that Defendant has failed to state a valid defense, and upon MCR 2.116(C) (10) on the ground that there is no genuine issue as to any material fact and Plaintiff is therefore entitled to judgment as a matter of law, and the court having reviewed Plaintiff's Motion, Affidavit and Supporting Brief, Defendant's Answers and Brief and Plaintiff's Reply Brief, and the court having heard the oral argument of counsel and being otherwise duly advised in the premises, the court hereby determines that 1987 Public Act 39 is not retroactively applicable to the Plaintiff's Complaint For Refund, the court specifically finding that Public Act 39 is more than a clarification of Section 69 of the Single Business Tax Act which it amended, but rather works a substantive change to the statute, and that giving Public Act 39 retroactive effect would adversely affect the substantial rights of the Plaintiff and for the further reason that giving retroactive effect to Public Act 39 would be contrary to the Separation of Powers clause of the Michigan Constitution which prohibits the Michigan Legislature from reversing the judicial interpretation of a statute once an appellate interpretation has been rendered, and the court hereby further determining that Plaintiff is entitled to Summary Disposition for the reason that there is no genuine issue as to any material fact, and the court specifically finds that the apportioned tax base resulting

Exhibit 15—Magic Chef

from the application of the three factor formula is not reflective of the Plaintiff's business activity in the State of Michigan and that the applicable standards for the relief requested by Plaintiff are contained in Section 69 of the Single Business Tax Act as originally enacted and interpreted and applied by the Michigan Court of Appeals in *Jones & Laughlin Steel Corporation v. Michigan Department of Treasury*, 145 Mich App 405, 377 NW2d 397 (1985), *lv den* 424 Mich 895 (1986), *mot for reconsid den* 424 Mich 895 (1986), and that the Defendant has failed to state a valid defense to the claim of the Plaintiff; NOW, THEREFORE, IT IS HEREBY

ORDERED, that Plaintiff's Motion for Summary Disposition under MCR 2.116(C)(9) is granted for the reason that Defendant has failed to state a valid defense and is also granted under MCR 2.116(C)(10) for the reason that there is no genuine issue as to any material fact and the Plaintiff is entitled to judgment as a matter of law against the Defendant in the amount of $153,013 together with interest thereon calculated in accordance with MCLA 208.97(3) and MCLA 205.30(3).

/s/ JAMES R. GIDDINGS
Honorable James R. Giddings,
Circuit Judge and Judge of the
Court of Claims

Entered on this 15th day of December, 1987.
By: /s/ Ann M. Baird
Clerk of the Court of Claims

Exhibit 16—Sara Lee

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

SARA LEE CORPORATION,

Plaintiff, Docket No. 87-11143-CM

v. HONORABLE CAROLYN STELL

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Defendant.

Patrick R. Van Tiflin (P26119)
FOSTER, SWIFT, COLLINS & COEY, P.C.
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Lansing, MI 48933
517/372-8050

Curtis G. Beck (P10600)
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ORDER AND JUDGMENT

At a session of said Court, held in the Circuit Courtrooms in Town Center, Lansing Michigan, on the 17th day of December, 1987.

PRESENT: HONORABLE CAROLYN STELL,
Circuit Judge, Presiding

This matter having been noticed on for hearing before this Court on Wednesday, November 25, 1987, on Plaintiff's Motion for Summary Disposition of its Complaint for Refund of Single Business Tax, and the parties having stipulated to waiver of oral argument by stipulation filed with this court and the Court having reviewed the pleadings filed by the respective parties in support of and in opposition to Plaintiff's Motion, and the Court being otherwise duly advised in the premises, and the Court finding as follows:

Defendant has not contested the factual content of Plaintiff's motion or the affidavit in support of Plaintiff's motion. The Defendant's response is that first, *Jones and Laughlin* is not a correct interpretation of the original legislative intent and, two, that the use of the statutory three-factor formula does result in a fair reflection of Plaintiff's Michigan business activity.

With respect to the first argument, *Jones & Laughlin* may or may not be a correct interpretation, but it is the interpretation of the Michigan Court of Appeals which has been allowed to stand by the Michigan Supreme Court's refusal to hear the case. Therefore, it is the law that this Court must follow. *Jones and Laughlin* says that the proper test for invoking Section 69 is whether the taxpayer's Michigan tax base as derived from the application of the three-factor apportionment formula to its adjused tax base accurately reflects the extent of the taxpayer's business activity within the state.

Defendant's brief cites 1987 P.A. 39 which offers an expression of the original intent of the Legislature. P.A. 39 provides that specific elements such as income should not be separately examined unless it can be demonstrated that the business activity attributed to the taxpayer in the state is out of all proportion to the actual business transacted in the state and leads to a grossly distorted result. Plaintiff responds by arguing that Defendant did not plead this as an affirmative defense until its amended answer and affirmative defense dated October 23, 1987. The original answer was filed on or about May 18, 1987. Defendant did not obtain leave of court or stipulation by Plaintiff to the filing of its amended answer as required by MCR 2.118(2). Plaintiff therefore contends assertion of this defense is improper. The scheduling conference order was signed on August 31st, 1987 by this Court, and it set October 30th, 1987, as a deadline for amending pleadings. I would note that in fact, as is set forth in the scheduling conference order, that because of my experience with these two counsel and because we've had many of these cases together, counsel themselves established these deadlines which were acceptable to the Court. So this is not some kind of artificial deadline imposed upon counsel by the Court, and counsel did so on August 26, 1987. This statute had been signed on June 9th, 1987. Therefore, counsel were aware at the time they met of the availability of this defense.

The Court holds that 1987 Public Act 39 is improperly raised and would not consider it for that reason. However, ruling in the alternative so that, in the end, if a re-

viewing court should find it was not untimely and that the Court is wrong in refusing to consider Defendant's affirmative defense, the court will consider it under several other theories. First, it appears that 1987 Public Act 39 presents two significant constitutional problems. The first is the issue of retroactivity and the situation is such that, as Plaintiff's counsel has pointed out, the law was not really in a state of flux. It was in a state of the Department of Treasury disagreeing very strenuously with an appellate court decision. But it was not the kind of situation in which retroactivity normally is granted on the theory that everybody knew everything was up in the air and therefore they should have been prepared for whatever result came down.

Secondly, I think that it presents constitutional problems under the commerce clause as detailed by Plaintiff's counsel. So, I would disregard it because of those constitutional problems. However, in the alternative, should a reviewing court find there are no constitutional problems either with the application of it retroactively or with the impact this has on the US Commerce Clause, I would make findings on a factual basis, and I would note that when a motion is made under MCR 2.116(C)(10), that an affidavit or supporting documentary evidence is required. That requirement was met by Plaintiff, both by affidavit and by citing to specific paragraphs in the Defendant's Answer to Plaintiff's Complaint. MCR 2.116 (G)(4) requires that the opposing party cannot simply deny, but must respond either by affidavit or other means set forth in the rule, and in the event of a failure to do so, that judgment shall be granted in favor of the moving

party if it is appropriate. Here, in looking at the facts, Plaintiff is a Maryland business corporation with its principal office in Chicago. Its business activity in Michigan consists of the sale of a variety of consumer products to customers in Michigan. For the years in question, compensation paid by the Plaintiff and included in the tax base ranged from $226,788,537 to $410,399,363, and represented as a percentage of the tax base between 77 and 99 percent.

The apportionment formula factors for the Plaintiff ranged from .011580 to .014811, resulting in a tax base apportioned to Michigan ranging from $3,529,677 to $7,421,332. The apportioned compensation ranged from $3,511,471 to $5,784,092, while the actual compensation for each of the challenged years ranged from 1,381,635 to 2,852,392. It is easy to observe from the Plaintiff's affidavit that the apportioned compensation grossly exceeded the actual compensation, by a percentage of excess ranging from 103% to 154%.

The Court finds that the totality of these circumstances results in a grossly distorted result even under P.A. 39 and therefore summary disposition is appropriate.

Defendant also raises a statute of limitations defense with respect to tax year 1980. Plaintiff argues the statute was tolled by a waiver of the federal statute of limitations on Plaintiff's federal income tax return for these years, citing MCL 208.97. The parties disagree as to the interpretation of § 85 of the Single Business Tax Act. This Court adopts the reasoning of Judge Harrison in

Exhibit 16—Sara Lee

Armco, Inc. v State of Michigan, Docket No. 84-9612 in the Court of Claims and rejects Defendant's position.

NOW, THEREFORE, IT IS ORDERED that Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(8) is granted for the reason that Defendant has failed to state a valid defense to Plaintiff's Complaint and also pursuant to MCR 2.116(C)(10), for the reason that there is no genuine issue as to any material fact and Plaintiff is entitled to judgment as a matter of law against the Defendant herein in the amount of $245,011, together with interest calculated in accordance with MCLA 208.97 (3) and MCLA 205.30(3).

/s/ CAROLYN STELL
Honorable Carolyn Stell, Circuit Judge
and Judge of the Court of Claims

Entered on this 17th day of December, 1987.

/s/ KAY L. HOUSEMAN
Clerk of the Court of Claims

Exhibit 17—Presto

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PRESTO PRODUCTS, INCORPORATED,

Plaintiff,

File No. 83-8827

v

HON. JAMES T. KALLMAN

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Defendant.

OPINION AND ORDER

The matter before the Court is an action filed by Plaintiff seeking a refund of single business taxes paid for 1978 through 1984. The facts are adequately set forth in the Stipulation of Facts filed by the parties and in an Affidavit filed by Plaintiff.

Plaintiff's claim for refund is based on § 69 of the Single Business Tax Act (hereinafter "the Act") as interpreted by the Michigan Court of Appeals in *Jones & Laughlin Steel Corp v Michigan Dep't of Treasury*, 145 Mich App 405; 337 NW2d 397 (1985), *lv to app den*, 424 Mich 895 (March 18, 1986), *mot for reconsid den*, 424 Mich 895 (October 22, 1986). Defendant contends, however, that *Jones & Laughlin ("J&L")* is not a correct interpretation of the original legislative intent in enacting § 69 of the Act. Defendant claims that 1987 PA 39, effective June 9, 1987, expresses the original legislative intent and applies to Plaintiff's claim for refund. This Court does not agree. 1987 PA 39 is not retroactively applicable to

Plaintiff's claim for refund for the tax years in issue for the reasons advanced by Plaintiff in its brief to this Court. This conclusion is consistent with this Court's holding in *Digital Equipment Corp v Michigan Dep't of Treasury*, Court of Claims Docket No. 86-10484-CM (Nov. 2, 1987), as well as Judge Brown's decision in *Consolidation Coal Company v Michigan Dep't of Treasury*, Court of Claims Docket No. 82-8407-CM (Aug. 27, 1987) and Judge Stell's ruling in *First Wisconsin Financial Corp v Michigan Dep't of Treasury*, Court of Claims Docket No. 87-11132-CM (Nov. 25, 1987).

Since 1987 PA 39 is not retroactively applicable, § 69 of the Act as originally enacted and as interpreted by the Michigan Court of Appeals in *J&L* is the law to be applied in this case. *J&L* provides that the proper test for invoking § 69 is whether the apportionment provisions of the Act do not fairly represent the extent of the taxpayer's business activity in this state. A distortion of 50% in apportioned compensation over actual Michigan compensation justified relief in *J&L*. Applying the *J&L* analysis to the facts of this case, the Court finds that Plaintiff's business activity within the state is not fairly represented by the use of the statutory three factor apportionment formula. The distortion in Plaintiff's actual Michigan compensation which results from application of the Act's apportionment formula ranges from 705% in 1981, to infinite distortion in 1984 when Plaintiff paid no actual compensation in Michigan yet the statutory apportionment formula attributed $394,771 in compensation to the state. This unfair representation of Plaintiff's business activity in the state resulting from the use of statutory apportionment formula justifies the § 69 relief requested by Plaintiff.

Defendant further contends that Plaintiff's claim for 1978 and 1979 is barred by the four year statute of limitations in § 97 of the Act. Plaintiff responds that the statute of limitations is tolled pending a final determination of this litigation of its single business tax liability for those years as provided in § 85 of the Act. Defendant counters that the commencement of this litigation did not toll the statute of limitations because the complaint originally filed did not contain a claim for § 69 relief, and that litigation only tolls the running of the statute for claims involved in that litigation. In support of this contention, Defendant cites *National Bank of Detroit v Michigan Department of Treasury*, Court of Claims Docket No. 84-9603 (Sept. 20, 1985). However, the *NBD* decision has been reversed by the Michigan Court of Appeals in *National Bank of Detroit v Michigan Department of Treasury*, Court of Appeals Docket No. 88585 (Nov. 18, 1987). A request for publication of this decision is currently under advisement. In *NBD*, the Court of Appeals held that litigation on the single business tax return required by the Act tolled the period of limitations, even though the litigation in which NBD was initially involved concerned an unrelated single business tax issue. Therefore, despite the fact that the issue involved in this litigation as originally filed was unrelated to the claim for relief based of § 69 of the Act, the commencement of this litigation by Plaintiff nonetheless operated to toll the § 97 statute of limitations. Accordingly, this Court finds that Plaintiff's claim for refund for 1978 and 1979 is not barred by the Act's four year statute of limitations.

Finally, the Defendant contends that Plaintiff's request for relief under §69 is invalid for the reason that Plaintiff has failed to attack each element of the apportionment formula, citing *Donovan Construction Co. v Michigan Dep't of Treasury*, 126 Mich App 11; 337 NW2d 297 (1983), *lv den*, 419 Mich 894 (1984) and *Payne & Dolan of Wisconsin v Michigan Dep't of Treasury*, 138 Mich App 418; 360 NW2d 208 (1984). Defendant's reliance on *Donovan* and *Payne & Dolan* is misplaced. First of all, those cases involved the Michigan Income Tax Act not the Single Business Tax Act. Secondly, in those cases, the Defendant therein and herein sought to completely discard the statutory apportionment formula in favor of a separate accounting. The Court of Appeals held that the party seeking to deviate from the apportionment formula must attack each element of the apportionment formula and demonstrate that each factor of the formula sought to be discarded would be inappropriate to measure the taxpayer's business activity in the state. In the case at bar, Plaintiff does not seek to discard the Act's apportionment formula. In fact, Plaintiff seeks to retain the three factor formula in its entirety and utilize it to apportion all elements of its tax base except for compensation, which is grossly distorted when the apportionment formula is applied, and which has been precisely measured and can be directly allocated to the state. Therefore, because Plaintiff does not seek to completely discard the apportionment formula, the Court finds that Plaintiff need not attack each element of the apportionment formula in order to be entitled to the relief requested. Neither the Michigan Tax Tribunal, the Michigan Court of Appeals nor the

Michigan Supreme Court required that *J&L* attack each element of the formula and permitted precisely the modification of the apportionment formula sought by Plaintiff herein.

Based on Plaintiff's demonstration of the unfair representation of its business activity in the state of Michigan which results from the use of the apportionment formula contained in the Act, the Court finds that Plaintiff is entitled to directly allocate compensation and apportion the remainder of its tax base as prayed for in its First Amended Complaint. NOW, THEREFORE, IT IS

ORDERED, that Plaintiff is entitled to judgment against the Defendant in the amount of $42,584, together with interest calculated in accordance with MCLA 208.97(3).

/s/ James T. Kallman
Hon. James T. Kallman
Court of Claims Judge

Dated: December 22, 1987

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WM. WRIGLEY JR. COMPANY

Plaintiff,

v

OPINION AND ORDER

File No. 87-11013-CM

REVENUE DIVISION,
DEPARTMENT OF TREASURY,
STATE OF MICHIGAN,

Defendant.

Hon. James T. Kallman

This Court, having heard oral arguments of counsel, having reviewed the file and being fully advised in the premises makes the following determinations:

This matter is before the Court on plaintiff's motion for summary disposition on its complaint and for summary disposition of defendant's counterclaim. This Court is satisfied that plaintiff's motions should be granted.

Plaintiff has presented detailed authority and arguments in favor of its position. The Court adopts them as its own. Defendant's defense largely consists of criticizing *Jones and Laughlin v MDOT* 145 Mich App 405 (1985) lv den 424 Mich 895(1986). This Court is bound by *Jones*. Plaintiff is entitled to the relief requested. Plaintiff shall submit a judgment with the appropriate judgment fee for signature.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's motion for summary disposition on its complaint is hereby GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion for summary disposition of defendant's counterclaim is hereby GRANTED.

DATED: December 23, 1987

/s/ James T. Kallman
James T. Kallman
Court of Claims Judge

Exhibit 19—Blue Bell

STATE OF MICHIGAN

COURT OF CLAIMS

---/

BLUE BELL, INC.,

Plaintiff,

Docket No. 86-10620-CM

v

HON. MICHAEL G. HARRISON

REVENUE DIVISION,
DEPARTMENT OF TREASURY,
STATE OF MICHIGAN,

---/

Patrick R. Van Tiflin (P26119)
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(517) 372-8050

Charles E. Liken (P16677)
Assistant Attorney General
Attorney for Defendant.

---/

ORDER AND JUDGMENT

At a session of said Court, held in the Circuit Courtrooms in City Hall, Lansing, Michigan on the 23rd day of December, 1987

PRESENT: HONORABLE MICHAEL G. HARRISON,
Chief Judge, Presiding

Exhibit 19—Blue Bell

This matter having come on for trial on Plaintiff's Complaint for Refund of Single Business Taxes relating to Plaintiff's fiscal years ended 9-30-81 through 9-30-85 and the Plaintiff having established that there is no genuine issue of material fact as to the relief requested in its Complaint or the Defendant's Counterclaim, the court hereby determines that Judgment should be rendered for the Plaintiff. This court is of the view that *Jones & Laughlin Steel Corporation v Michigan Department of Treasury* 145 Mich App 405, 337 NW2d 397 (1985), *lv den* 424 Mich 895 (1986), *mot for reconsid den* 424 Mich 895 (1986) states the law applicable to Plaintiff's Complaint which is binding on this court and which this court should apply to the facts of this case. The facts of this case indicate that the distortion resulting from the application of the three factor formula (279% - 433%) far exceeds that distortion which was present in *Jones & Laughlin* and justifies the relief requested. As a trial court, this court views its role as that of following the law as given to it by the appellate courts, and specifically in this case, by the Court of Appeals action and the Supreme Court inaction, in the *Jones & Laughlin* case. It is not within the power of this Court to decide that a decision of an appellate court which sits in review of this court is erroneous and to decline to follow an appellate court decision under those circumstances. On the contrary, this court determines that the facts in this case fall squarely within the holding of *Jones & Laughlin* and the trial court does not have the right to rule in any other fashion.

The Defendant urges that 1987 Public Act 39 applies to Plaintiff's Complaint for Refund and that Plaintiff

has no cause of action if Public Act 39 applies. This court is of the view that it should avoid a conflict with constitutional principles wherever possible in applying and interpreting the law, and specifically, this court feels no need to reach the question of the applicability of Public Act 39 to Plaintiff's Complaint for the reason that, even assuming that Public Act 39 applies to the Plaintiff's Complaint, this court is of the view that Section 3 is abridged in that the apportionment provisions of the Act, when applied to Plaintiff's tax base for the years involved, attribute business activity to Plaintiff in this state which is out of all appropriate proportion to the actual business transacted in this state and lead to a grossly distorted result.

Finally, this court is of the view that *Penn Mutual Life Insurance Company el at* [sic] *v Department of Licensing and Regulation, el at* [sic] 162 Mich App 123 (1987) is inapplicable to this case. This court is of the view that the appropriate time for Defendant to have argued for a prospective only application of the *Jones & Laughlin* decision was at the time that the *Jones & Laughlin* case was being presented since the *Jones & Laughlin* court itself did not give prospective only application to its decision, it is inappropriate for this court to do so in this case.

The Court therefore finds in favor of the Plaintiff for the relief requested in its Complaint, and in so doing, this Court incorporates the rationale for its decision in *Armco*, Court of Claims Docket No. 86-10689-CM and *Clevite*, Court of Claims Docket No. 86-10716-CM, NOW THEREFORE IT IS HEREBY

ORDERED, that the Plaintiff is hereby granted a Judgment in its favor and against the Defendant in the amount of $140,545 together with interest thereon calculated in accordance with MCL 208.97 and, IT IS HEREBY FURTHER

ORDERED, that Defendant's Counterclaim be and the same is hereby dismissed for the reason that employment of a single factor apportionment formula as suggested by Defendant's Counterclaim would result in more rather than less distortion and would be inappropriate in light of the facts of this case.

/s/ MICHAEL G. HARRISON
Honorable Michael G. Harrison
Chief Circuit Judge and Judge of
the Court of Claims

Approved as to form:
/s/ Charles E. Liken
Charles E. Liken (P16677)
Attorney for Defendant

Entered on this 23rd day of December, 1987.
/s/ PHYLLIS E. SMITH
Clerk of the Court

Exhibit 20—Sheller-Globe

STATE OF MICHIGAN
COURT OF CLAIMS

---/

SHELLER-GLOBE CORPORATION,

Plaintiff,

Docket No. 87-11073-CM

HONORABLE CAROLYN STELL

v

REVENUE DIVISION,
DEPARTMENT OF TREASURY,
STATE OF MICHIGAN,

Defendant.

---/

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Lansing, Michigan 48933
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Charles E. Liken (P16677)
Assistant Attorney General
Attorney for Defendant

---/

ORDER AND JUDGMENT

At a session of said Court held in the Circuit Courtrooms in Town Center, Lansing, Michigan, on the 4th day of January, 1988.

PRESENT: Honorable Carolyn Stell, Circuit Judge
Presiding

Exhibit 20—Sheller-Globe

This matter having come on for hearing before this Court on Wednesday, November 25, 1987, on Plaintiff's Motion for Summary Disposition of its Complaint for Refund of Single Business Tax and the Court having reviewed the pleadings filed by the respective parties in support of and in opposition to Plaintiff's Motion and the Court having conducted a hearing and heard the oral argument of counsel for the parties and being otherwise duly advised in the premises, the Court hereby determines that the Plaintiff has filed its Motion for Summary Disposition with a supporting Brief and an Affidavit as required by MCR 2.116(G)(3)(b) and the Defendant not having set forth specific facts by affidavit or as otherwise provided in that rule showing that there is a genuine issue for trial and the Court finding in the absence of such specific facts that judgment is appropriate under the rationale of *Jones & Laughlin Steel Corp v Michigan Dep't of Treasury*, 145 Mich App 405; 377 NW2d 397 (1985), *lv to app den*, 424 Mich 895 (March 18, 1986) *mot for reconsid den*, 424 Mich 895 (October 22, 1986) by which decision this Court considers itself to be bound; NOW, THEREFORE, IT IS

ORDERED, that Plaintiff's Motion for Summary Disposition be and the same hereby is granted in accordance with MCR 2.116(c)(10) for the reason that there is no genuine issue of material fact and the Plaintiff is entitled to judgment against the Defendant as a matter of law in the

amount of $859,717 together with interest calculated in accordance with MCLA 208.97(3).

/s/ Carolyn Stell
CAROLYN STELL, Circuit Judge
and Judge of the Court of Claims

/s/ JODY KRANZ
Clerk of the Court

STATE OF MICHIGAN
COURT OF CLAIMS

---/

USX CORPORATION (formerly
United States Steel Corporation),

Docket No. 86-10901-CM

v

HONORABLE THOMAS
L. BROWN

REVENUE DIVISION,
DEPARTMENT OF TREASURY,
STATE OF MICHIGAN.

---/

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Charles E. Liken (P16677)
Assistant Attorney General
Attorney for Defendant

---/

ORDER AND JUDGMENT

At a session of said Court, held in the Circuit Courtrooms, in City Hall, in the City of Lansing, County of Ingham, State of Michigan, on the 21st day of Jan 1988.

PRESENT: Honorable Thomas L. Brown, Circuit Judge, Presiding

This matter having come on for hearing on January 6, 1988 on Plaintiff's Motion for Summary Disposition and

Exhibit 21—USX

the court having reviewed the Plaintiff's Motions, Briefs and Affidavit in support of said Motions and the Answers and Brief of the Defendant and the court having heard oral argument thereon and being otherwise duly advised in the premises, NOW, THEREFORE IT IS

ORDERED, that Plaintiff's Motion for Summary Disposition is granted as Defendant's asserted defense of 1987 Public Act 39 is not retroactively applicable to Plaintiff's claim for refund and because the result in this case is governed by § 69 of the Single Business Tax Act as originally enacted and as interpreted and applied by the Michigan Court of Appeals in *Jones & Laughlin Steel Corporation v Michigan Department of Treasury*, 145 Mich App 405, 377 NW2d 397 (1985), *lv den* 424 Mich 895 (1986), *mot for reconsid den* 424 Mich 895 (1986) and the prospective only concept of *Penn Mutual Life Insurance Company, et al v Department of Licensing and Regulation, et al*, 162 Mich App 123 (1987) is not applicable to the *Jones & Laughlin* decision and the Plaintiff is therefore entitled to Judgment in its favor and against the Defendant in the amount of $2,579,928 together with interest thereon calculated in accordance with MCLA 208.97 and MCLA 205.30.

Thomas L. Brown
Honorable Thomas L. Brown, Circuit Judge and Judge of the Court of Claims

Exhibit 21—USX

APPROVED AS TO FORM:

/s/ Charles E. Liken
Charles E. Liken (P16677)
Attorney for Defendant

Laurie Schoun
Clerk of the Court

Exhibit 22—Northern Telecom

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

---/

NORTHERN TELECOM, INC.,

Plaintiff, Docket No. 86-10406-CM

v HONORABLE CAROLYN STELL

REVENUE DIVISION,
DEPARTMENT OF TREASURY,
STATE OF MICHIGAN.

Defendant.

---/

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---/

ORDER AND JUDGMENT

At a session of said Court, held in the Circuit Courtrooms in Town Center, Lansing, Michigan, on the 23rd day of February, 1988.

Exhibit 22—Northern Telecom

PRESENT: HONORABLE CAROLYN STELL, Circuit Judge, Presiding

This matter having been set on for trial before this Court on Tuesday, February 23, 1988, and the parties having filed a Stipulation of Facts dated February 5, 1988 and the parties having stipulated to waiver of oral argument by stipulation filed with this court and the Court having reviewed the court file in this matter, and the Court being otherwise duly advised in the premises, and the Court finding as follows:

The facts are not contested. The Defendant's defense is that first, *Jones and Laughlin* is not a correct interpretation of the original legislative intent and, two, that the use of the statutory three-factor formula does result in a fair reflection of Plaintiff's Michigan business activity.

With respect to the first argument, *Jones & Laughlin* may or may not be a correct interpretation, but it is the interpretation of the Michigan Court of Appeals which has been allowed to stand by the Michigan Supreme Court's refusal to hear the case. Therefore, it is the law that this Court must follow. *Jones and Laughlin* says that the proper test for invoking Section 69 is whether the taxpayer's Michigan tax base as derived from the application of the three-factor apportionment formula to its adjusted tax base accurately reflects the extent of the taxpayer's business activity within the state.

Defendant's brief cites 1987 P.A. 39 which offers an expression of the original intent of the Legislature. P.A. 39 provides that specific elements such as income should

not be separately examined unless it can be demonstrated that the business activity attributed to the taxpayer in the state is out of all proportion to the actual business transacted in the state and leads to a grossly distorted result. It appears that 1987 Public Act 39 presents two significant constitutional problems. The first is the issue of retroactivity and the situation is such that, as Plaintiff's counsel has pointed out, the law was not really in a state of flux. It was in a state of the Department of Treasury disagreeing very strenuously with an appellate court decision. But it was not the kind of situation in which retroactivity normally is granted on the theory that everybody knew everything was up in the air and therefore they should have been prepared for whatever result came down.

Secondly, I think that it presents constitutional problems under the commerce clause as detailed by Plaintiff's counsel. So, I would disregard it because of those constitutional problems. However, in the alternative, should a reviewing court find there are no constitutional problems either with the application of it retroactively or with the impact this has on the US Commerce Clause, I would make findings on a factual basis. Here, in looking at the facts, Plaintiff is a Delaware business corporation with its principal office in Nashville, Tennessee. Its business activity in Michigan consists of the operation of manufacturing facilities and sales offices. For the years in question, compensation paid by the Plaintiff and included in the tax base ranged from $35,390,261 to $173,300,422, and represented as a percentage of the tax base between 70 and 100 percent.

The apportionment formula factors for the Plaintiff ranged from .004189 to .015614, resulting in a tax base apportioned to Michigan ranging from $428,761 to $2,007,968. The apportioned compensation ranged from $355,677 to $1,621,225, while the actual compensation for each of the challenged years ranged from $42,747 to $185,951. It is easy to observe from the Plaintiff's affidavit that the apportioned compensation grossly exceeded the actual compensation, by a percentage of excess ranging from 396% to 772%.

The Court finds that the totality of these circumstances results in a grossly distorted result even under P.A. 39 and therefore Judgment in favor of Plaintiff is appropriate.

Defendant also raises a statute of limitations defense with respect to years 1977 through 1979. Plaintiff argues the statute was tolled by a waiver of the federal statute of limitations on Plaintiff's federal income tax return for these years, citing MCL 208.97. The parties disagree as to the interpretation of § 85 of the Single Business Tax Act. This Court incorporates by reference its decision in *E. I. du Pont de Nemours and Company v. Michigan Department of Treasury*, Court of Claims Docket No. 86-10381-CM, to the effect that waiver of the statute of limitations on Plaintiff's Federal Income Tax return tolls the running of the Single Business Tax Statute of Limitations on refund claims. NOW, THEREFORE, IT IS

ORDERED, that Plaintiff is entitled to judgment as a matter of law against the Defendant herein in the

amount of $46,263, together with interest calculated in accordance with MCLA 208.97(3) and MCLA 205.30(3).

Carolyn Stell
Honorable Carolyn Stell, Circuit Judge and Judge of the Court of Claims

APPROVED AS TO FORM:

/s/ Russell E. Prins
Russell E. Prins (P19110)
Entered on this 23 day of February, 1988.

Jenean K. Battin
Clerk of the Court of Claims

TABLE 4

Business Sector	Components of Michigan Tax Base: Compensation	% of Column Total	% of Row Total	Business Income	% of Column Total	% of Row Total	Additions	% of Column Total	% of Row Total	Subtractions	% of Column Total
Agriculture	$ 126,915,987	0.3	72.1	$ (12,602,299)	(0.4)	(7.2)	$ 71,541,657	0.5	40.6	$ 9,750,533	0.
Mining	219,365,723	0.5	54.6	27,191,969	0.8	6.8	239,722,259	1.7	59.6	84,125,928	2.
Construction	2,131,773,502	4.6	82.5	101,594,020	3.0	3.9	430,399,492	3.1	16.6	78,440,286	2.
Other Durable Manufacturers	3,100,868,105	6.7	77.7	438,663,253	12.8	11.0	638,386,173	4.5	16.0	189,180,129	5.
Non-Durable Manufacturers	3,269,995,332	7.0	66.1	1,003,399,373	29.3	20.3	1,087,689,629	7.7	22.0	411,974,561	11.
Primary Metal Industries	1,353,854,985	2.9	81.7	91,085,053	2.7	5.5	279,344,412	2.0	16.9	66,688,017	1.
Fabricated Metal Products	1,480,260,507	3.2	80.0	171,215,354	5.0	9.3	270,195,376	1.9	14.6	72,247,040	2.
Machinery-Except Electrical	2,201,178,290	4.7	77.7	329,437,362	9.6	11.6	444,475,451	3.2	15.7	141,072,457	4.
Transportation Equipment	10,533,916,766	22.7	94.8	(1,093,328,495)	(32.0)	(9.8)	2,163,536,438	15.3	19.5	497,675,853	14.
Transportation	1,551,436,364	3.3	85.8	(118,151,923)	(3.5)	(6.5)	403,501,511	2.9	22.3	28,858,069	0.
Communications & Utilities	1,392,738,487	3.0	51.4	(20,903,441)	(0.6)	(0.8)	1,385,788,927	9.8	51.1	45,514,715	1.
Wholesale Trade	1,510,291,140	3.3	68.6	442,610,720	12.9	20.1	432,287,622	3.1	19.6	183,159,575	5.
Retail Trade	9,574,169,664	20.6	79.2	890,310,451	26.0	7.4	2,185,508,334	15.5	18.1	555,462,675	16.
Finance Insurance, Real Estate	1,703,262,006	3.7	59.6	(52,666,508)	(1.5)	(1.8)	1,978,897,904	14.0	69.3	773,528,859	22.
Services and Other	6,246,280,456	13.5	67.6	1,222,578,432	35.7	13.2	2,097,690,493	14.9	22.7	330,546,763	9.
All Businesses	$46,336,507,314	100.0	76.7	$3,429,433,321	99.8	5.7	$14,108,965,678	100.1	23.3	$3,468,225,460	100.

Exhibit 23 Analysis of the Michigan Single Business Tax

TABLE 4

Components of Michigan Tax Base

Compensation	% of Column Total	% of Row Total	Business Income	% of Column Total	% of Row Total	Additions	% of Column Total	% of Row Total	Subtractions	% of Column Total	% of Row Total	Total	% of Column Total	% of Row Total
$ 136,915,987	0.3	72.1	$ (12,602,299)	(0.4)	(7.2)	$ 71,541,657	0.5	40.6	$ 9,750,533	0.3	(5.5)	$ 176,106,812	0.3	100.0
219,765,723	0.5	54.6	27,191,969	0.8	6.8	239,722,259	1.7	59.6	84,125,928	2.4	(20.9)	402,354,023	0.7	100.1
2,131,773,542	4.6	82.5	101,596,020	3.0	3.9	430,399,492	3.1	16.6	78,440,286	2.3	(3.0)	2,585,326,728	4.3	100.0
3,100,963,105	6.7	77.7	438,663,253	12.8	11.0	638,386,173	4.5	16.0	189,180,129	5.5	(4.7)	3,988,737,402	6.6	100.0
3,209,995,332	7.0	66.1	1,033,399,373	29.3	20.3	1,087,689,629	7.7	22.0	411,974,561	11.9	(8.3)	4,949,109,773	8.2	100.1
1,353,354,985	2.9	81.7	91,985,053	2.7	5.5	279,344,412	2.0	16.9	66,688,017	1.9	(4.0)	1,657,596,433	2.7	100.1
1,480,200,507	3.2	80.0	171,215,356	5.0	9.3	270,195,376	1.9	14.6	72,247,040	2.1	(3.9)	1,849,424,197	3.1	100.0
2,301,129,290	4.7	77.7	329,437,862	9.6	11.6	444,475,451	3.2	15.7	141,072,457	4.1	(5.0)	2,834,018,646	4.7	100.0
10,533,916,766	22.7	96.8	(1,093,328,495)	(32.0)	(9.8)	2,163,536,438	15.3	19.5	497,675,853	14.3	(4.5)	11,106,448,856	18.4	100.0
1,551,436,366	3.3	85.8	(118,151,923)	(3.5)	(6.5)	403,501,511	2.9	22.3	28,858,069	0.8	(1.6)	1,807,927,883	3.0	100.0
1,892,783,487	3.0	51.4	(30,903,441)	(0.6)	(0.8)	1,885,788,927	9.8	51.1	45,514,715	1.3	(1.7)	2,712,109,258	4.5	100.0
1,510,291,140	3.3	68.6	442,610,739	12.9	20.1	432,287,622	3.1	19.6	183,159,575	5.3	(8.3)	2,202,029,907	3.6	100.0
9,574,169,666	20.6	79.2	893,310,451	26.0	7.4	2,185,508,336	15.5	18.1	555,462,675	16.0	(4.6)	12,096,525,774	20.0	100.1
1,703,262,006	3.7	59.6	(52,666,498)	(1.5)	(1.8)	1,978,807,906	14.0	69.3	773,528,859	22.3	(27.1)	2,855,966,543	4.7	100.0
6,246,280,456	13.5	67.6	1,222,588,432	35.7	13.2	2,997,660,493	14.9	22.7	330,546,763	9.5	(3.6)	9,236,002,618	15.3	99.9
$46,336,907,334	100.0	76.7	$3,430,433,321	99.8	5.7	$14,108,965,638	100.1	23.3	$3,468,225,460	100.0	(5.7)	$60,457,680,853	100.1	100.0

EXHIBIT 23

Exhibit 24—Single Business Tax Calculation

Tax Base		Average Apportionment Percentage					
(major components are federal taxable income, compensation, depreciation, interest, royalties and dividends)	x	factors are sales, property, and payroll (not the same as compensation component in tax base)	=	Apportioned Tax Base*	x	Tax Rate	= Tax Liability

* Capital acquisition adjustments are allowed to apportioned tax base, but are not revelant to this case.

Exhibit 25—UDITPA Prefatory Note

UNIFORM DIVISION OF INCOME FOR TAX PURPOSES ACT

Prefatory Note

The Uniform Division of Income for Tax Purposes Act is designed for enactment in those states which levy taxes on or measured by net income.

The need for a uniform method of division of income for tax purposes among the several taxing jurisdictions has been recognized for many years and has long been recommended by the Council of State Governments. There is no other practical means of assuring that a taxpayer is not taxed on more than its net income. At present there are various formulae for determining the amount of income to be taxed in use by the states, and the differences in the formulae produce inequitable results. Many states now use the three factor formulae of this Act. The problem has been well analyzed and its historical background outlined in an article appearing in 18 Ohio State Law Journal, page 84.

The Uniform Division of Income for Tax Purposes Act is the result of conferences with the representatives of the Controller's Institute of America, the Council of State Governments and various interested individuals. It was promulgated in 1957. The comments in the present reprinting of the Act were revised and extended in February 1966 in order to clarify the solutions to some of the problems which have been experienced in securing enactment of the Act in the several states.

March 1, 1966

Exhibit 26—UDITPA § 18 and Editorial Comment

Section 18. If the allocation and apportionment provisions of this Act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the [tax administrator] may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the exclusion of any one or more of the factors;

(c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Comment

It is anticipated that this Act will be made a part of the income tax acts of the several states. For that reason, this section does not spell out the procedure to be followed in the event of a disagreement between the taxpayer and the tax administrator. The income tax acts of each state presumably outline the procedure to be followed.

Section 18 is intended as a broad authority, within the principle of apportioning business income fairly among the states which have contact with the income, to the tax administrator to vary the apportionment formula and to vary the system of allocation where the provisions of the Act do not fairly represent the extent of the taxpayer's business activity in the state. The phrases in

section 18(d) do not foreclose the use of one method for some business activity and a different method for a different business activity. Neither does the phrase "method" limit the administrator to substituting factors in the formula. The phrase means any other method of fairly representing the extent of the taxpayer's business activity in the state.